Supreme Court, U.S.
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No._____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

*Petitioners,*

*-against-*

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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FREDERICK EISENBUD
Counsel of Record
RICHARD C. CAHN
EUGENE L. WISHOD
CAHN WISHOD & LAMB, LLP
534 Broadhollow Road
CS 9034
Melville, New York 11747
(516) 694-2300

*Counsel for Petitioners*

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OFFICIAL OFFSET PRINTING CORP. • 8600 NEW HORIZONS BLVD. • AMITYVILLE, NY 11701 • (516) 957-8500

H3PP

## QUESTIONS PRESENTED

1. Whether a commercial solid waste regulatory scheme adopted by the Town of Babylon, New York, without Congressional authorization, that eliminates competition within a commercial solid waste district and allows the town to provide exclusive commercial solid waste services within the district, financed by mandatory user fees, the practical design and effect of which is to compel generators of waste to use the town's services, and to cause 96,000 tons per year of commercial solid waste that previously was available to interstate commerce for recycling and/or disposal to be incinerated at the town's solid waste resource recovery facility, discriminates against interstate commerce and is prohibited by the dormant Commerce Clause of the United States Constitution.

2. Whether the requirement that irreparable harm be demonstrated before a preliminary injunction can be issued is satisfied by a showing that rights secured by the Commerce Clause of the United States Constitution will be violated if such an injunction does not issue.

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are those set forth in the caption.

Pursuant to Supreme Court Rule 29.1, neither Petitioner U.S.A. Recycling, Inc. nor Petitioner Friendly Carting, Inc. has a parent or subsidiary company.

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*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners U.S.A. Recycling, et al. pray that a writ of certiorari issue to review the judgment and order of the Second Circuit Court of Appeals.

## OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is

reported at 66 F.3rd 1272 (2d Cir. 1995). The decision disposed of Commerce Clause claims raised both in the instant case, and in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon.* The *A.A. & M.* petitioners filed a Petition for a Writ of Certiorari with this Court on January 30, 1996 (No. 95-1223). Both the decision of the Second Circuit, and the transcript of the proceedings of the District Court at which the order appealed from was rendered, are reproduced in the Appendix to the A.A. & M. Petition for a Writ of Certiorari, which Petition has been served on counsel for the Respondents here.[1] The decision and transcript are incorporated by reference herein ("A.A. & M. Appendix _____"). The decision of the Second Circuit is reproduced in A.A. & M. Appendix A at 1a-46a. The unpublished bench opinion of the United States District Court for the Eastern District of New York granting a preliminary injunction is reproduced in A.A. & M. Appendix B at 47a-101a. No written order was issued by the district court.

## JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on September 19, 1995 (A.A. & M. Appendix 1a). Its order denying Petitioners' timely request for Rehearing with Suggestion for Rehearing In Banc, entered on November 16, 1995, is annexed hereto as Exhibit C (103a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL, STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art.

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[1] The issues presented in the instant case and *A.A. & M.* are not identical.

I, § 8, cl. 3, provides in pertinent part: "Congress shall have Power... To Regulate Commerce... among the several States...."

Pertinent portions of Babylon Town Code Chapter 133 (Solid Waste Management), adopted on January 10, 1995, and of the Commercial Waste Collection and Recycling Service Agreement Between the Town of Babylon on Behalf of the Town of Babylon Commercial Garbage District No. 2 and Babylon Source Separation Commercial, Inc., entered into on December 2, 1994, are contained in Appendix D hereto (104a et. seq).

## STATEMENT OF THE CASE

*Preliminary Statement:*

This case involves the applicability of *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. ____, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) to a monopoly municipal commercial solid waste district that was created to insure that 96,000 tons per year of commercial solid waste, previously available to interstate commerce, would be delivered to that municipality's resource recovery facility for incineration. Although 96,000 tons per year of commercial solid waste were taken out of commerce altogether, and the United States Court of Appeals for the Second Circuit agreed that Babylon acted as a market regulator when it created the district and prevented all but a single carter from operating within it, the lower court concluded that there was no discrimination against interstate commerce. It reached this conclusion by relying upon two 90-year old decisions of this Court (*Gardner v. Michigan, 199 U.S. 325 [1905]*, and *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 [1905]) which together established that a municipality acts within its police powers when it grants to a single entity the right to collect and dispose of garbage, but did not discuss

whether the actions taken discriminated against interstate commerce in violation of the Commerce Clause. The Second Circuit recognized that these early cases were not dispositive of the Commerce Clause arguments raised by the petitioners, but "refuse[d] to undercut the longstanding precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." (A.A. & M. Appendix 43a).

The Second Circuit's ruling sustaining Babylon's exclusive control over solid waste services is inconsistent with rulings in the Third and Eleventh Circuits *(Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3rd 701 [3rd Cir. 1995], *and Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 [M.D. Ala. 1993], *aff'd* 29 F.3rd 641 [11th Cir. 1994]), decisions which the Second Circuit neither acknowledged nor discussed.

Petitioners do not challenge the right of the Town to form a collection district, or to have a competitive bid process, which, if properly conducted, can lead to the selection of a single contractor to provide collection services for waste generated by departments of town government, or by anyone else who wishes to use the offered services. This case presents the question whether, consistent with the dormant Commerce Clause, a municipality may provide exclusive solid waste services without prior Congressional authorization. It also presents the additional question whether a showing of likelihood of success on the merits of a Commerce Clause claim constitutes a sufficient showing of irreparable harm for the purpose of determining entitlement to a preliminary injunction.

*Statement of Facts:*

Prior to the creation of the commercial garbage district by the Town of Babylon, Long Island, New York, businesses within the town were free to contract with any carter licensed by the town to collect and dispose of their commercial waste. A flow control law enacted by the town in 1987 directing the flow of waste within the town to its resource recovery facility was determined by the town attorney to be unenforceable following the *Carbone* decision. The law had been enacted in an attempt to insure that the town would meet its contractual obligation to the operator of the local resource recovery facility, Ogden Martin Systems of Babylon, Inc. (Ogden Martin), to deliver 225,000 tons per year of solid waste to the incinerator, or suffer a penalty for any shortfall. In addition, the agreement with Ogden Martin compels the town to pay Ogden Martin fourteen million dollars a year, regardless of the tonnage of waste delivered to the incinerator.

The town's solution was to create a commercial garbage district, and to select, through a competitive bid, a single carter (Babylon Source Separation Commercial Inc. [BSSCI]) to collect commercial solid waste within the district. The contract entered into between the town and BSSCI guaranteed that only BSSCI would be permitted to collect commercial solid waste within the district. To insure that the waste collected would be delivered to the Ogden Martin resource recovery facility, the contract permits BSSCI to deliver up to 96,000 tons per year to the resource recovery facility without charge. If the waste is taken anywhere else, BSSCI will be responsible for paying the disposal fee.

Because the 17 licensed commercial carters within the town had legally enforceable contracts with customers, the contract between the town and BSSCI was not self executing. In order to displace the licensed carters from their contracts and

customers, it was necessary for the town to amend its solid waste law (Babylon Town Code Chapter 133) so as to make it impossible for the formerly licensed carters to comply with their contractual obligations, or for their customers to use their services. Under the previous law, any entity licensed by the town could collect commercial solid waste. The town amended its local law on January 10, 1995 to eliminate general collection licenses within the district, and to authorize issuance of a Class 2 license, a license available only to a party under contract with the town or district to perform collection services within the district. Because BSSCI was the only entity under such a contract, it was the only entity eligible to receive a Class 2 license.

Although the district consists of all commercially zoned properties within the district, whether improved or unimproved, the town determined that it would exempt owners of vacant parcels from a flat $1,500.00 fee imposed on owners of improved parcels. Each improved property is entitled to basic service, consisting of collection by BSSCI of one cubic yard of commercial solid waste per week and one cubic yard of recyclable material every other week. If commercial businesses within the district require additional collection, they will be charged $9.75 for each cubic yard of solid waste above the first cubic yard per week.[2]

The 17 carters previously licensed by the town to collect commercial solid waste anywhere within the town now may only

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[2] While the town charges a tipping fee of $65.00 per ton at its incinerator, when the cost of collection (based on the contract with BSSCI) is taken out, and the assumption made by the Town as to the weight of an average cubic yard of commercial solid waste is factored in, the $1,500 annual fee equates to a charge of approximately $271.00 per ton for disposal of the first cubic yard of commercial waste collected each week, and the $9.75 per cubic yard charge amounts to approximately $112.00 per ton for disposal

obtain a license to collect such waste outside of the new district, and their customers may no longer use their services. If these carters collect solid waste within the district, both they and their customers will be subject to fine and/or incarceration for up to 15 days.

Petitioner Friendly Carting, Inc. ("Friendly") is one of the seventeen carters formerly licensed by the town to collect commercial solid waste. Friendly Carting is owned by Anthony Leteri, who also owns petitioner U.S.A. Recycling, Inc. ("U.S.A."). Both Friendly and U.S.A. are located in Smithtown, a neighboring town. U.S.A. has a permit issued by the State of New York authorizing it to operate a solid waste management recycling facility. U.S.A.'s permit allows it to receive mixed commercial solid waste, to remove recyclables from the mixed waste, and to dispose of the residue at any facility licensed to receive it. At the time the Babylon Town Code was amended in January, 1995, approximately 60% of the mixed commercial waste U.S.A. received at its facility was separated for resale to companies located both within and without New York State.

Friendly Carting provides U.S.A. with access to the Babylon market. The Babylon District went into effect on January 1, 1996, and U.S.A. no longer will be able to process waste generated from within the Babylon commercial district in accord with its New York license. Thus, approximately 60% of the mixed commercial solid waste from within the District that U.S.A. previously processed will be incinerated instead of recycled.

*The Decisions Below:*

On February 2, 1995, the district court granted petitioners' motion for a preliminary injunction. Although Chief Judge Platt

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of waste above the first cubic yard each week.

did not agree that a violation of rights secured by the Commerce Clause constituted irreparable harm, he refused to allow the status quo to be altered "[b]ecause I think on my reading of the Carbone case, in any event, as a matter of law and it's virtually the equivalent of granting a permanent injunction at this point, is that matter -- that that matter of law has got to be overturned, in my book, to not require me to maintain the status quo." (A.A. & M.Appendix 59a). Chief Judge Platt saw no meaningful distinction between the Town of Clarkstown's flow control law that was ruled invalid in *Carbone*, and the Town of Babylon's contractual obligation to allow BSSCI to dump 96,000 tons per year of commercial garbage at the Ogden Martin resource recovery facility for free, because the Town thereby created "not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility" (A.A. & M. Appendix 52a).

The Town and BSSCI appealed, and the Second Circuit Court of Appeals reversed (A.A. & M. Appendix la-46a). Although it found that the district court erred when it granted a preliminary injunction without finding irreparable harm, it reached the merits of the Commerce Clause argument, holding (A.A. & M. Appendix 45a):

> First, towns can assume exclusive responsibility for the collection and disposal of local garbage. Second, towns can hire private contractors to provide municipal services to residents. In neither case does a town discriminate against, or impose any burden on, interstate commerce. The local interests that are served by consolidating garbage service in the hands of the town -- safety, sanitation, reliable garbage service, cheaper service to residents -- would in any event outweigh any arguable burdens place on interestate commerce.

The Second Circuit's conclusion that towns can assume exclusive responsibility for the collection and disposal of local garbage was predicated on its observation at the outset of its decision that "For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States." (A.A. & M. Appendix 2a). Acknowledging that *California Reduction Co.* and *Gardner* did not "address whether the municipal waste systems comported with the Commerce Clause," the lower court stated that it would squarely face that question (A.A. & M. Appendix 2a).

The Second Circuit first found that "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the limitations of the dormant Commerce Clause because it constitutes regulation of that market, not participation in it." (A.A. & M. Appendix 18a). Having acknowledged that the town obtained control over the commercial garbage collection market through regulation, however, the court thereafter disregarded this fact in the balance of its decision. The Court of Appeals found that Babylon was a market participant when it purchased collection services from BSSCI, and disposal services from Ogden Martin, and thus could do what it wanted with the services it had purchased. The court found, erroneously, that those services had been purchased with general taxes, rather than through user fees imposed on a captive market. It then concluded that there was no discrimination against interstate commerce without ever determining whether the "practical effect and design" of the regulatory scheme as a whole discriminated against interstate commerce, as this Court instructed should be done in *Carbone*, 114 S.CT. at 1682-83.

At the conclusion of its decision, the Second Circuit returned to the premise which marked its opening -- that it was deciding the case "against the backdrop of two venerable,

and until now unchallenged, decisions of the Supreme Court [*California Reduction Co.* and *Gardner*]. (A.A. & M. Appendix 40a). The Second Circuit "refuse[d] to undercut the longstanding precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." (A.A. & M. Appendix 43a).

## REASONS FOR GRANTING THE WRIT

### I.

### REGULATION WHICH ENTIRELY ELIMINATES PRIVATE COLLECTION AND DISPOSAL SERVICE IN THE SOLID WASTE COLLECTION AND PROCESSING INDUSTRY IN FAVOR OF MUNICIPAL SERVICE DISCRIMINATES AGAINST INTERSTATE COMMERCE.

#### A. Without Prior Congressional Authorization, a Municipality May Not Require Exclusive Participation in its Own Solid Waste Services.

The Second Circuit ignored the "practical effect and design" of the Babylon scheme as a whole, and instead analyzed each component part in a vacuum, finding each part to be constitutional. Although the court found that the Town's "decision to eliminate the commercial garbage collection market constitutes 'market regulation' rather than 'market participation,'" it nevertheless found that "it does not discriminate in any way against interstate commerce." (A.A. & M. Appendix 19a). The lower court's strained reasoning is that there is no discrimination because the Town eliminated the market entirely, and that "not

even the Town itself remains as a seller in the market'' (A.A. & M. Appendix 19a). Rather, ''[a]lthough the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base'' (A.A. & M. Appendix 19a-20a). Even though ''taxpayers in the District ultimately foot the bill for these garbage services -- just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments -- the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* [*SSC Inc. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)] required, and that rendered those ordinances discriminatory against interstate commerce.'' (A.A. & M. Appendix 21a).

But for the Babylon scheme, 96,000 tons per year of commercial solid waste would be available to the interstate market for processing, recycling and disposal. Here, as in *Carbone*, the ''design and effect'' of the scheme as a whole is to hoard ''solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.'' 114 S.Ct. at 1683.

Under the reasoning of the Second Circuit, *Carbone* stands only for the narrow proposition that a municipality may not adopt local laws or ordinances directing the flow of solid waste within the municipality to a private facility. Based on this view, regardless how much solid waste is generated within a municipality's borders which was formerly available to the interstate processing market for recycling and/or disposal, the municipality may constitutionally cause the solid waste to flow to the municipality's facility, without concern that by doing so, it will be considered to have discriminated against interstate commerce.

The Commerce Clause implications of the Babylon solid

waste scheme cannot be determined by analysis of its separate parts in isolation as the Second Circuit did ("we proceed to decide *whether each component* of Babylon's waste management system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause.") (emphasis added) (A.A. & M. Appendix 17a). Courts must look to the "practical effect and design" of a regulatory scheme to determine whether a municipality is discriminating against interstate commerce. *Carbone*, 114 S.Ct. at 1682-83. In *West Lynn Creamery v. Healy*, 114 S.Ct. 2205 (1994), this Court rejected the suggestion that it should review the elements of the state regulatory program before it separately. Even though the various components of the program, viewed separately, might have been constitutional, this Court said, "[t]he choice of constitutional means *** cannot guarantee the constitutionality of the program as a whole." 114 S.Ct. at 2215.[3]

In *Carbone*, the Town of Clarkstown was contractually obligated to pay for the debt service incurred by the private operator that constructed the transfer facility, and after five years, could have purchased the facility for one dollar. In Babylon, the Town is contractually obligated to pay off the debt service incurred by the Babylon I.D.A., the entity that paid for construction of the Ogden Martin Resource Recovery Facility. There is no meaningful distinction between Clarkstown's and Babylon's circumstances. Justice Souter, in his dissenting opinion in *Carbone*, noted that the case before the Court involved a municipal, not a private, facility,[4] and cited *Gardner*

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[3] The Town's critical need to divert 96,000 tons per year of commercial garbage to the Ogden Martin facility establishes why the lower court's effort to analyze the collection and disposal aspects of the Babylon scheme separately makes no sense. Collection cannot be accomplished in a vacuum -- the garbage must be set down somewhere so that it can either be processed or disposed of. The scheme adopted by the town is not different in "design and effect" from the flow control law it conceded could no longer be enforced after *Carbone*.

[4] Before this Court in the Joint Appendix in *Carbone* was the affidavit

and *California Reduction Co.* for the proprosition that "the Court recognized that for municipalities struggling to abate their garbage problems, the Constitution did not require unimpeded private enterprise." 114 S.Ct. at 1697 n. 10. The significance of the 1905 cases relied upon by the Second Circuit was fully argued by the Town of Clarkstown,[5] but its argument did not prevail.

*Gardner* and *California Reduction Co.* did not discuss the Commerce Clause implications of the municipal schemes under review. This is not surprising. In 1905, incinerators had no pollution control devices, and landfills were unlined; garbage could be burned or buried without any processing whatsoever.[6] Additionally, compaction vehicles capable of taking advantage of economies of density, and the use of transfer stations where waste could be unloaded into larger vehicles or temporary storage facilities, needed to help overcome the problems of distant collections, were not introduced until after World War II.[7]

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of the Supervisor of the Town of Clarkstown, Charles E. Holbrook, who discussed the "contract for the construction and operation of the TOWN's transfer station...". Joint Appendix, *C & A Carbone v. Town of Clarkstown*, Supreme Court Index No. 92-1402, at 9-11.

[5] Respondent Town of Clarkstown made references to both of the 1905 cases throughout the Brief it filed in *Carbone*. *See* Brief for Town of Clarkstown, dated August 23, 1993, at 13, 22, 28-29, 41, 42 and 43.

[6] Melosi, "The 'Garbage Crisis' and the Weight of History," 1 J. Urban Technology, 1, 3 (1994):

> Collection and disposal systems in the nineteenth century were initially designed to deal with large amounts of organic material -- such as food waste and horse manure -- as well as with wood and coal ash, and an assortment of rubbish. For many years, little was known about the long-term environmental consequences disposing of waste beyond a growing suspicion about the potential health hazards of putrefying organic materials. Consequently, collection and disposal systems were chosen to conform with the popular notion of "out of sight, out of mind."

[7] *Id.* at 5.

Recycling, which has only recently achieved economic "takeoff", consisted of little more than people sorting through rubbish as it was loaded onto barges headed out to sea to look for material that might be sold to junkdealers.[8] In 1905, the low cost of disposal made it impractical for anyone outside of the immediate geographic area of the generator to compete for the waste.

By contrast, it is now well established that solid waste is "an article of commerce," *Fort Gratiot Landfill v. Mich. Dept. of Nat. Resources*, 112 S.Ct. 2019, 2023 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978), as is "the service of processing and disposing of it." *Carbone*, 114 S.Ct. at 1682. *Gardner* and *California Reduction Co.* did not have to be overruled by the Supreme Court in *Carbone* because their only import is that a municipality's exercise of exclusive control over solid waste is a proper exercise of its police power. *Carbone* establishes that the exercise of police powers in the solid waste area in a manner that discriminates against interstate commerce is *per se* invalid unless the town "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 114 S.Ct. at 1683.

Petitioners do not challenge the right of the Town to form a non-exclusive collection district, or to have a competitive bid process, which, if properly conducted, can lead to the selection of a single contractor to provide collection services for waste generated by departments of town government, or by anyone else who wishes to use the offered services. By preventing anyone but the favored contractor, BSSCI, from obtaining a license to collect solid waste within the District, by mandating that everyone within the District use the service offered, by enacting penalties for anyone other than BSSCI who attempts to collect solid waste within the District or for any generator

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[8] *Id.* at 9.

of commercial waste who attempts to use services other than those granted to BSSCI, and by using the money collected from the captive members of the District to subsidize disposal of waste at the Ogden Martin Resource Recovery Facility solely for the benefit of BSSCI, however, the Town goes too far.

Regardless whether a town's solid waste scheme benefits a private entity or the town itself, the impact on interstate commerce remains the same. In *Carbone*, the flow control law forced all waste within the town to be processed as an initial step at the town's transfer facility, from which it went off into interstate commerce, without limitation. This ordinance was found to discriminate against interstate commerce because no one but the operator of the preferred facility could perform the initial processing step. By contrast, the Babylon solid waste scheme forces all waste generated within the commercial district to flow to the Ogden Martin resource recovery facility, where it is incinerated and forever lost to commerce. The impact on interstate commerce of the Babylon scheme is far greater than the Town of Clarkstown's, yet Clarkstown's ordinance was ruled invalid, and Babylon's thus far has been sustained.

The Second Circuit placed great reliance on two 1905 cases of this Court which did not discuss the Commerce Clause, and virtually ignored this Court's 1994 decision in *Carbone*. The arguments made to and rejected by this Court in *Carbone* were repeated by the Town of Babylon, and accepted by the Second Circuit. Recent precedents of this Court should not be so lightly disregarded.

By way of example, this Court observed in *Carbone* (114 S.Ct.at 1681):

> [E]ven as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce

> Clause. It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.

Clarkstown argued that its ordinance did not discriminate because it required all waste, regardless of origin, to be processed at the designated facility before it left the Town. This Court rejected the argument, in part because (Id. at 1682):

> As the town itself points out, what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.
>
> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.

The Court viewed the flow control ordinance before it as "just one more instance of local processing requirements that [the Court long has] held invalid." *Id.* The "essential vice" in these laws is that they "bar the import of the processing service", *id.* at 1683, and "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*[9]

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[9] Under the reasoning of the Second Circuit, the outcome of *Carbone* would have been different had five years elapsed, and the town exercised the option to purchase the transfer station for the sum of one dollar. But the record in *Carbone* reflected the assumption that the transfer station involved was a municipal facility, operated, as in Babylon, by a private contractor. The outcome of the case turned on the practical design and effect of the local regulation on interstate commerce, and the majority concluded that barring everyone but the one local facility from having access to the initial processing step discriminated against interstate commerce. The fact that the Clarkstown transfer facility was a municipal facility was irrelevant.

"Discrimination against interstate commerce in favor of local business or investment is *per se* invalid," this Court said, "save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* Any such claim, however, must be "rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.*

Significantly, this Court ruled that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Id.* at 1684. If the goal is to assure the long-term survival of the designated facility (*Id.*):

> [T]he town may subsidize the facility through general taxes or municipal bonds. (citation deleted) But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Reasonable, nondiscriminatory alternatives to the District, such as economic flow control, have been shown to work by Babylon. In 1992, when the Town found that it was losing garbage to other jurisdictions because its tipping fee was too high, it lowered the fee from $78.00 per ton to $65.00, and immediately achieved the flow of garbage to the Resource Recovery Facility that it wanted; the town managed to maintain that flow throughout 1994, despite this Court's *Carbone* decision in May. Revenue shortfall was made up by an ad valorem tax. This was precisely what the majority in *Carbone* suggested was a reasonable, nondiscriminatory means of accomplishing the goal of ensuring the long-term survival of the designated facility: "If [that is the goal], the town may subsidize the facility through general taxes or municipal bonds." 114 S.Ct. at 1684. Because the Second Circuit concluded there was no discrimination against interstate commerce, it did not consider whether reasonable, nondiscriminatory alternatives to

the Babylon financing scheme existed.

The Second Circuit misconstrued the import of this Court's reference in *Carbone* to "general taxes". While the use of general taxes to subsidize a facility which cannot otherwise compete in the open market may not discriminate against interstate commerce,[10] the same cannot be said of the decision by Babylon to eliminate competition and take over the entire market through regulatory means for the benefit of that facility. The financing of the Babylon district through mandatory user fees from businesses that formerly could use other collection and disposal services underlines the critical fact that Babylon achieved control over its market as a market regulator, not as a market participant.[11]

Even had Babylon financed its solid waste scheme through general taxes, it would not be immune from Commerce Clause scrutiny. The issue for the Court would still be whether the practical design and effect of the scheme was to discriminate against Interstate Commerce. If a once open market suddenly

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[10] *But see City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 n. 6 (1978) which left open the question whether a municipality may, "consistent with the Commerce Clause, *** spend [municipal] funds solely on behalf of [municipal] residents and businesses". Because the Babylon scheme is financed by user fees, and not general taxes, this issue is not presented.

[11] "User fees are contractual in nature and a charge for the actual use of a service." Opinions N.Y.S. Comptroller 92-18 at 46. Here, the Town has determined that only the owners of improved property should be assessed the $1,500.00 flat annual fee, and that only users of the collection service who generate more than the quanitty covered by the flat assessment should pay an additional fee. The Town Board expressly determined that owners of unimproved property within the District would not be subject to charges. This determination precludes a finding that the fees charged are benefit assessments or taxes. Benefit assessments must be imposed upon all properties, not just improved properties. Opinions N.Y. S. Comptroller 92-18 at 46. Likewise, such fees cannot be considered a tax, for a tax in this context is "a charge to finance a municipal service, imposed without regard to whether the persons required to pay the charge are particularly benefitted by the service or actually use the service". *Id.* at 45.

becomes closed because of Babylon's exercise of regulatory control over the market, the scheme is invalid under *Carbone*.

The propriety of providing street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments which are paid for out of general taxes (A.A. & M. Appendix 20a) simply is not presented by this case,[12] and the Second Circuit's attempt to add solid waste services to this list is a "red herring" which seeks to divert analysis from the Commerce Clause issue. A nation-wide solid waste and recycling industry has been born and that industry is dependent upon access to local markets. If Congress concludes that it is desirable to allow Babylon or other municipalities to exercise exclusive control over solid waste within a given area, even though the resulting program will discriminate against interstate commerce and adversely affect the nation's solid waste and recycling industries, Congress may do so. The only issue for the lower court should have been whether the town's solid waste scheme discriminated against interstate commerce, not whether sound public policy should, nevertheless, allow the town to proceed.

**B. The Market Participation Cases Decided by This Court Do Not Support the Second Circuit's Conclusion That a Municipality May Mandate Exclusive Use of a Single Supplier to Provide Solid Waste Services Without Discriminating Against Insterstate Commerce.**

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[12] Even if it were necessary to compare Babylon's decision to provide exclusive solid waste services to other common services provided from general taxes, the conclusion would still be that solid waste services may not be provided on an exclusive basis. For example, when the town sweeps streets, it sweeps its own streets -- it does not compel private businesses to use the town's street sweeping services for their private driveways and parking lots, and then charge them a user fee for the service. Street lighting is provided by the town for public streets and buildings; the town does not compel private businesses to use town contractors if they wish to light their private buildings and parking lots, and force them to pay a user fee for the service.

Babylon has eliminated all competition in the commercial solid waste collection, processing and disposal market within the District, and has instructed the private businesses within the District that they have no choice but to use the town's service and pay whatever fee the town determines to be appropriate. Under the reasoning of the Second Circuit, this is not discrimination against interstate commerce because the town is simply acting as a market participant in the collection and disposal markets.

In arriving at its "market participant" rational, the Second Circuit ignored its own threshold conclusion that Babylon had gained control over the solid waste collection, processing and disposal markets within the District. Refusing to consider that the act of taking over the local markets in the first instance was itself discriminatory, the lower court looked to the market participation cases decided by this Court to justify the subsequent actions by the town. These cases, however, do not provide support for the lower court's untenable conclusion that the exercise of regulatory authority to exclude everyone from participating in a market but the municipality does not discriminate against interstate commerce.

This Court has developed an exception to the broad reach of the Commerce Clause to address situations where a state or municipality is directly acting as a participant in the market, rather than as a regulator. *Hughes v. Alexandria Scrap*, 426 U.S.794, 96 S.Ct. 2488 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204, 103 S.Ct. 1042 (1983); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *see, also, South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984).

Two reasons underlie the so-called market-participant doctrine. First, there is "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely

to exercise his own independent discretion as to parties with whom he will deal." *White v. Massachusetts Council*, 460 U.S. at 207 n. 3, 103 S.Ct. at 1044 n. 3, *quoting United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468 (1919). "Evenhandedness suggests that, when acting as proprietors, States should... share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves, Inc. v. Stake*, 477 U.S. at 439, 100 S.Ct. at 2278-79 (citations omitted). Second, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.* at 436-37, 100 S.Ct. at 2277 (citation omitted). "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.*

None of the market participant cases decided by this Court support the lower court's decision. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488 (1976), the Court upheld Maryland's decision to pay bounties for the destruction of any vehicle titled in Maryland, but to require out-of-state scrap processors to provide more extensive documentation than it required of in-state processors to show that the vehicle was abandoned and the wrecker had clear title. Maryland's scheme was not the kind of action covered by the Commerce Clause because the State had entered the market itself. *Id.* at 806. The critical distinction between the Babylon solid waste scheme and the Maryland statute at issue in *Alexandria Scrap* is that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur." 426 U.S. at 608. Maryland did not force people to sell abandoned vehicles to the State, but Babylon forces generators of commercial solid waste to use the Town's services.

The other cases decided by this Court where states or municipalities were found to be acting as market participants are similarly distinguishable from the Babylon scheme. In *Reeves*, 447 U.S. 429 (1980), the State reserved the right to sell

concrete from its plant to local residents in times of shortage -- it did not attempt to prevent its residents from purchasing concrete elsewhere. In *White*, 460 U.S. 204 (1983), the City established workforce requirements on City construction projects -- it did not attempt to dictate to contractors working for private parties who they should hire. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Court suggested it would have been proper for Oklahoma to compel state-owned utility companies to purchase 10 percent of all coal from Oklahoma suppliers, but ruled invalid the same requirement as applied to private companies. And in *South Central Timber Development*, 467 U.S. 82 (1984), the Court found that the market participant doctrine did not apply where the State required that timber taken from state lands be processed within the state prior to export. The market participation doctrine was found not to apply, even though Alaska did not force timber buyers to purchase the State's timber in the first instance.

The lower court ignored the regulatory aspects of the Babylon scheme which it found to be present, and determined only whether the scheme's individual parts fit within the market participation doctrine. The town did not enter into a commercial transaction in the marketplace alongside private businesses, however, and thus should not have been found to be a market participant, immune from Commerce Clause scrutiny. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (market participation exception would not apply because the state land commission had a complete monopoly over the sites being leased; only "state's participation in the marketplace as a *competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem. by an equally divided Court*, 471 U.S. 81 (1985).

Unless this Court clarifies the scope of the market participation doctrine, what was intended to be a narrow exception to the dormant Commerce Clause's prohibition against state or municipal actions that discriminate against interstate commerce

threatens to swallow the very protection the Commerce Clause was intended to provide.

### C. The Second Circuit's Decision is Inconsistent With Rulings of the Third and Eleventh Circuits.

The decision of the Second Circuit is inconsistent with decisions in the Third and Eleventh Circuits, and the conflict should be resolved by this Court.

In *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3rd 701 (3rd Cir. 1995), the plaintiff, Atlantic, owned a transfer station in Philadelphia which received construction and demolition material for processing. Atlantic challenged the flow control provisions of New Jersey's comprehensive solid waste management system. The Third Circuit rejected the State's argument that the distinction between its system and that in Clarkstown, i.e., that New Jersey's designated facilities were regulated public utilities, should alter the Commerce Clause analysis (*Id.* at 718):

> [W]e do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

The Third Circuit went on to reject the State's market participation argument, in language clearly at odds with the decision of the Second Circuit in the instant case (*Id.* at 717):

> Under New Jersey's solid waste disposal program, the districts are doing more than making choices about what waste they will accept **even in those instances where the district owns the designated facility.** The waste flow regulations purport to control the market activities of private market participants. **Those regulations do not concern only the manner of operation of the government-**

> **owned or government-managed designated disposal facilities; they require everyone involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal. They do not merely determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service -- even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant. As a result, those regulations are not immune from review under the Commerce Clause.** (emphasis added)

The Second Circuit's decision is also inconsistent with the Eleventh Circuit's decision in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,* 29 F.3d 641 (11th Cir.1994), *affirming,* 814 F.Supp. 1566 (M.D. Ala. 1993), where the court flatly rejected an attempt by three municipalities to stave off a commerce clause challenge to ordinances governing the collection and disposal of solid waste, the purpose of which was to direct all solid waste to a disposal facility to be constructed by a public non-profit corporation organized under state law. One of the three municipalities, the City of Geneva, Alabama, by ordinance, vested in the city title to all waste generated within the city's boundaries and prohibited private collectors from contracting directly with generators of solid waste. Geneva retained the exclusive right to collect all solid waste generated within its borders unless it chose to contract with private haulers and collectors. As in the instant case, the ordinances required public participation, prohibited private businesses from collecting and disposing of solid waste unless the businesses complied with the ordinances, prohibited businesses that failed to comply with the ordinances from using public streets to collect and haul solid waste, and threaten-

ed civil enforcement and misdemeanor penalties against violators. The Eleventh Circuit flatly rejected Geneva's and the other municipalities' claims that they were market participants: "[t]he expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but broad market regulation." 814 F.Supp. at 1572-73.

### D. The Impact of the Second Circuit's Ruling on Interstate Commerce Will Be Significant.

"The volume of commerce affected measures only the *extent* of the discrimination[, and] is of no relevance to the determination whether a State has discriminated against interstate commerce." *Fort Gratiot Landfill v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019, 2025 n. 4 (1992), *quoting Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992) (emphasis in the original); *see, also, Oregon Waste Systems v. Dept. of Env. Quality*, ____ U.S. ____, 114 S.Ct. 1345, 1350 n. 4 (1994). Nevertheless, the implications of the Second Circuit's reasoning are enormous. Within New York State alone, thirty-seven local municipalities have been authorized by the State to adopt flow control laws,[13] and more than twenty states in all have granted similar authority to their local governments (*Carbone*, 114 S.Ct. at 1690 [O'Connor, J., concurring]). The road map for circumnavigating this Court's decision in *Carbone* approved by the Second Circuit, unless reversed, will undoubtedly be followed across the country, with the result that we will have the "type of balkanization the [Commerce] Clause is primarily intended to prevent." *Carbone*, 114 S.Ct. at 1690 (O'Connor, J., concurring)

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[13] *See* the following New York laws: L. 1976, ch. 913 (Niagra Co.); L. 1979, ch. 509 (Town of Oyster Bay); L. 1979, ch. 510 (Town of North Hempstead); L. 1980, ch. 560 (New York City); L. 1981, ch. 932 (Onondaga County); L. 1982, ch. 632 (Town of Islip); L. 1982, ch. 675 (Dutchess Co.); L. 1983, ch. 502 (St. Lawrence Co.); L. 1983, ch. 513 (Washington Co.); L. 1983, ch. 930 (Broome Co.); L. 1984, ch. 638

The need to clarify the market participation doctrine and the principles set out in *Carbone* is apparent, for lower courts are showing an alarming tendency to ignore the teachings of this Court. For example, on the same day that it rendered its decision in the instant case, the Second Circuit also decided *SSC, Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995). There, the Second Circuit agreed that a flow control law compelling all solid waste collected within the town to be delivered to a local resource recovery facility discriminated against interstate commerce and was void under *Carbone*, but sustained the same provision in a contract between the town and a carter who had won a competitive bid to provide collection services within a residential district.[14]

The Third Circuit also has adopted a strained interpretation of Carbone in order to avoid having to invalidate a local flow control scheme. In *Harvey & Harvey, Inc. v. County of Chester*,

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(North Hempstead Solid Waste Management Authority); L. 1985, ch. 478 (Town of Babylon); L. 1985, ch. 670 (Jefferson and Lewis Counties); L. 1985, ch. 697 (Essex Co.); L. 1985, ch. 797 (Town of Hempstead); L. 1986, ch. 627 (Western Finger Lakes Solid Waste Management Authority); L. 1986, ch. 840 (Town of Huntington); L. 1986; ch. 936 (Ulster Co.); L. 1987, ch. 71 (Warren Co.); L. 1987, ch. 485 (Orleans Co.); L. 1987, ch. 747 (Montgomery Otsego and Schoharie Counties); L. 1987, ch. 773 (Saratoga Co.); L. 1988 ch. 627 (Oneida and Herkimer Counties); L. 1988, ch. 665 (Franklin Co.); L. 1988, ch. 667 (Town of Brookhaven); L. 1988, ch. 670 (Essex Co.); L. 1989, ch. 80 (Town of Smithtown); L. 1989, ch. 726 (Eastern Rensselaer Co.); L. 1991, ch. 540 (Fulton Co.); L. 1991, ch. 569 (Madison Co.); L. 1991, ch. 631 (certain towns in Westchester Co.); L. 1992, ch. 252 (Tompkins Co.); L. 1992, ch. 350 (Greene Co.); L. 1992, ch. 369 (Sullivan Co.); L. 1992, ch. 391 (Greater Troy Solid Waste Management Authority); L. 1992, ch. 567 (Town of Riverhead); L. 1992, ch. 629 (Westchester Co.).

[14] Currently pending before this Court is the petition of SSC Corp. for a writ of certiorari from so much of the Second Circuit's decision as sustained the flow control provision in the contract, and the cross-petition of the Town of Smithtown from the portion of the ruling that ruled invalid the town's flow control ordinace.

68 F.3d 788 (3d Cir. 1995), the Third Circuit addressed two separate Commerce Clause challenges to municipal flow control plans. The lower court concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, there is no Commerce Clause violation. *Carbone* stresses that the focus of inquiry must be on the "design and effect" of the challenged scheme, 114 S.Ct. at 1683, not the process. Despite what appeared to be a clear ruling in *Carbone*, the Third Circuit has concluded that a factual inquiry must be made in each flow control case before it can be determined whether there has been discrimination against interstate commerce.

The difficult task of reconciling conflicting policies which must be undertaken whenever a state or municipality perceives the need to adopt protectionist laws and ordinances that discriminate against interstate commerce is placed by our Constitution squarely on the shoulders of Congress -- not on the lower courts. If the protection offered by the Commerce Clause is not to be swallowed whole by its exceptions, this Court must intervene and clarify its prior rulings.

## II

## DEPRIVATION OF RIGHTS SECURED BY THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION PROVIDE A PROPER BASIS FOR A DETERMINATION THAT IRREPARABLE HARM WILL RESULT WITHOUT A PRELIMINARY INJUNCTION.

The Second Circuit agreed with the town's and BSSCI's claim that Chief Judge Platt committed reversible error by granting a preliminary injunction despite concluding that petitioners would not be irreparably harmed in its absence. Although the lower court could have affirmed the order of the district court "on any ground that appears in the record below," *Frankel v. Slotkin*, 984 F.2d 1328, 1334 (2d Cir. 1993), and there

was ample evidence that petitioners would have been irreparably harmed but for the preliminary injunction, the Second Circuit found that it was error to have granted the preliminary injunction.

This case raises the question whether the principle that a deprivation of constitutional rights or privileges or immunities under the United States Constitution constitutes irreparable injury, *see Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), should be applied to deprivations of rights secured under the Commerce Clause. There is a conflict among the lower courts on this issue. *Compare, Mid-America Waste Systems, Inc. v. Lee Fisher*, case no. C-2-94-493 (U.S. Dist. Ct. So. Dist. Ohio) (May 31, 1994) (violation of Commerce Clause supported issuance of TRO); *C & A. Carbone v. Town of Clarkstown*, 770 F.Supp. 848, 854 (S.D. N.Y. 1991) (accord); and *Garcia v. Hon. Bauza Salas*, 686 F.Supp. 965, 971 (D.P.R. 1988) (accord), *with Grand Central Sanitation, Inc. v. City of Bethlehem*, 1994 U.S. Dist., LEXIS 15825 (E.D. Pa. 1994).

This conflict should be resolved by the Court.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

Frederick Eisenbud
*Counsel of Record*
Richard C. Cahn
Eugene L. Wishod
Cahn Wishod & Lamb, LLP
534 Broadhollow Road
CS 9034
Melville, New York 11747-9034
(516) 694-2300

*Counsel for Petitioners*

# APPENDICES

# APPENDIX A

**[1a-46a]**

## DECISION OF THE SECOND CIRCUIT COURT OF APPEALS (SEPTEMBER 19, 1995)

**[This document is contained in the Appendix to the Petition for Writ of Certiorari filed in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon, et al.*, which was filed in the Supreme Court on January 30, 1996 (No. 95-1223), and is incorporated herein by reference].**

# APPENDIX B

**[47a-102a]**

## TRANSCRIPT OF DISTRICT COURT PROCEEDINGS (February 2, 1995)

**[This document is contained in the Appendix to the Petition for Writ of Certiorari filed in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon, et al.*, which was filed in the Supreme Court on January 30, 1996 (No. 95-1223), and is incorporated herein by reference].**

**APPENDIX C**

**UNITED STATES COURT OF APPEALS**
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

**GEORGE LANGE III**
**CLERK**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of November one thousand nine hundred and ninety-five.

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USA Recycling, Inc., et al.

Plaintiffs-Appellees,

v.

Dkt. No.: 95-7129

Town of Babylon, et al.,

Defendant-Appellant.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee USA Recycling, Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

GEORGE LANGE III, Clerk

By:_____
Beth J. Meador,
Administrative Attorney

**APPENDIX D**

## STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

### BABYLON TOWN CODE CHAPTER 133 (SOLID WASTE MANAGEMENT) ADOPTED JANUARY 10, 1995:

**SECTION 133-4(A) (Collection and Disposal):**

The removal, transportation and/or disposal of solid waste shall be managed, supervised and/or performed by the Town or its agent(s) under this chapter, together with such rules and regulations as the Town has or shall from time to time adopt. Such solid waste generated within the Town shall be removed, transported and/or disposed of only by refuse collectors licensed pursuant to the requirements of this chapter and the amendments thereto or as permitted by the terms of any agreement with the Town. All other persons are hereby prohibited therefrom except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter. ***

**SECTION 133-14 (LICENSE CLASSIFICATIONS AND FEES):**

A. A Class 1 license shall be required of all persons engaged in the collection and transportation of garbage, refuse, recyclable material, ashes or solid waste outside the improvement areas, or for collection and transportation of recyclable material only within the commercial improvement area if properly authorized by the property owner. ***

B. A Class 2 license shall be required of all persons engaged in the collection and transportation of garbage, refuse, solid waste and recyclable material within an improvement area authorized pursuant to a contract with the Town to collect and transport solid waste, garbage, refuse or recyclable material. ***

**SECTION 133-31 (PENALTIES FOR OFFENSES):**

A. Notwithstanding any other provision of this chapter, ... the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

**SECTION 133-37 (USE OF UNLICENSED PRIVATE COLLECTORS):**

A. It shall be unlawful for any person to enter into any agreement or arrangement, whether a fee is paid therefor or not, whereby a person not licensed by the Commission pursuant to this chapter, removes solid waste, rubbish or debris, recyclable material, or construction and demolition debris within the Town.

B. No person shall be cited for a violation of this section unless given an opportunity to terminate the agreement or arrangement with the unlicensed collector within fifteen (15) days of receipt of a notice from the Town advising that the collector being used is unlicensed and said person refuses to terminate said agreement or arrangement within the fifteen-day period.

**COMMERCIAL WASTE COLLECTION AND RECYCLING SERVICE AGREEMENT BETWEEN THE TOWN OF BABYLON ON BEHALF OF THE TOWN OF BABYLON COMMERCIAL GARBAGE DISTRICT NO. 2 AND BABYLON SOURCE SEPARATION COMMERCIAL, INC. (ENTERED INTO DECEMBER 2, 1994):**

**ARTICLE 1 (DEFINITIONS):**

Basic Service. The basic Service shall be provided to each Eligible Parcel. The service shall consist of once a week collection of a one cubic yard container of CII [i.e., commercial, industrial and institutional]- Refuse and the

equivalent of once every other week collection of a one cubic yard container of CII-Recyclables.

**ARTICLE 2 (SCOPE OF SERVICES):**

***

It is the intent of this Agreement to grant exclusive Collection services of CII Refuse within the District. To effectuate this intent the Town will issue only one license to provide collection services of CII Refuse to Eligible Parcels within the Town of Babylon Garbage District No. 2.

**SECTION 2.2.7 (DISPOSAL):**

Contractor may deliver CII Refuse collected by dedicated Collection Vehicles from eligible Customers to the Town Resource Recovery Facility or such other Disposal Site that the Town may direct. Alternatively, Contractor may deliver CII Refuse collected from Eligible Customers to an alternate Disposal Site for disposal at its own cost. During the first year of the term of this Agreement, contractor shall have the right to dispose of 96,000 tons of CII Refuse at the Town Resource Recovery facility at no charge to the Contractor.

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

Nos. 95-1223 and 95-1271

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC., *et al.*,
*Petitioners,*
v.
TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING and RECYCLING DISTRICT, *et al.*,
*Respondents,*

U.S.A. RECYCLING, INC., *et al.*,
*Petitioners,*
v.
TOWN OF BABYLON, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

BRUCE J. PARKER *
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
4301 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20008
(202) 364-3730

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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Nos. 95-1223 and 95-1271

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A.A. & M. CARTING SERVICE, INC., *et al.*,
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TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING and RECYCLING DISTRICT, *et al.*,
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U.S.A. RECYCLING, INC., *et al.*,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

---

### INTEREST OF THE *AMICUS CURIAE*

The National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 1300 member companies operate in virtually all 50 states, and who are engaged in the full spectrum of solid waste

management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the solid waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.[1]

NSWMA represents the interests of the solid waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. Such measures necessarily obstruct the interstate movement of waste, and thus, directly and adversely affect the interests of NSWMA's members. Accordingly, the NSWMA has a strong interest in presenting the views of its membership on the constitutionality of the flow control scheme at issue here.

## SUMMARY OF ARGUMENT

The decision below is one of a series, arising in the aftermath of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677 (1994) (*"Carbone"*), in which courts of appeals have upheld efforts by states or localities to evade *Carbone* by various methods designed to insure that waste continues to be funneled to local disposal facilities. Those decisions have already spawned four petitions for certiorari seeking review by this Court. While the waste control schemes devised by the towns and the rationale adopted by the courts for upholding them differ in the various cases, the underlying message is the same—despite *Carbone*, towns need not dismantle their protectionist waste control schemes. They

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[1] All of the parties in this case granted their consent to this amicus brief as reflected in letters filed with the Clerk of the Court.

need only replace their flow control ordinances with more ingenious techniques for achieving the same result.

Review by this Court is thus urgently needed to address these efforts by localities to evade *Carbone*. It seems certain that, absent intervention by this Court, localities—emboldened by decisions such as this—will continue efforts to block the flow of waste beyond their borders. At the time this Court handed down its opinion in *Carbone*, approximately 43 states had authorized local governments to institute flow control ordinances.[2] The waste facilities those ordinances were designed to protect cost millions to build and receive millions in revenues.[3] Because of the huge economic stakes involved, it is inevitable that numerous localities, such as Babylon here, will continue to seek to devise waste management plans that modify the form of their waste flow regimes without altering their substance. And the Second Circuit's decision in this case has provided those localities with a road map to achieve their protectionist goals.

The judicial approval of these municipal waste schemes has occurred against the backdrop of the repeated failure of state and local governments to convince Congress to enact legislation authorizing local control of the flow of waste. Thus, even though Congress has chosen to leave the constraints of the Commerce Clause intact, certain courts have not. And in upholding evasive municipal schemes, these courts have traded the task of conducting Commerce Clause scrutiny to become virtual "legislatures of last resort"—taking on a policy-making role properly reserved for Congress.

Moreover, this decision has ramifications far beyond the waste flow context. The court of appeals here upheld

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[2] *House Comm. on Energy & Commerce, State Control of Management of Municipal Solid Waste*, H.R. Rep. No. 738, 103d Cong., 2d Sess. 7 (1994).

[3] *See* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529, 567 (1994).

the waste flow scheme at issue on the basis of a fragmented, component-by-component application of the market participation doctrine—an approach which finds no support in the decisions of this Court and provides a blueprint for states and towns seeking to avoid Commerce Clause restrictions on a wide range of governmental activities. The potential impact of this decision on dormant Commerce Clause jurisprudence is a further reason justifying review by this Court.

## ARGUMENT

### I. LOWER COURTS ARE UPHOLDING THE FLOW CONTROL SCHEMES OF LOCALITIES IN DEFIANCE OF THIS COURT'S DECISION IN *CARBONE* AND CONGRESS' REFUSAL TO AUTHORIZE SUCH LAWS

State and local laws restricting the free movement of trash in interstate commerce have proved to be a particularly nettlesome subject requiring repeated attention by this Court. Over seventeen years ago, the Court ruled that trash is entitled to the protection of the Commerce Clause and that state or local laws restricting the *import* of trash constitute a discrimination against interstate commerce that is virtually *per se* invalid. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The law laid down in *City of Philadelphia* seemed clear. Yet in its aftermath the Court on three separate occasions was forced to confront local schemes—upheld by the lower courts—designed to continue to discourage the import of out-of-state waste. In each instance, this Court found that the newly devised scheme discriminated against interstate commerce. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Natural Resources*, 504 U.S. 353 (1992).

*Carbone* was the first case to address the constitutionality of a local law designed to prohibit the *export* of trash to out-of-state points. This Court's ruling was again unequivocal—such a law is "just one more instance of local processing requirements that we long have held invalid." *Carbone*. 114 S. Ct. at 1682. Because the "design and effect" of the ordinance was to "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," *id.* at 1683, the export restraint was held to discriminate against interstate commerce.

Just as before, however, localities are devising means to avoid this Court's Commerce Clause teachings. And, as the Second Circuit's decision demonstrates, these efforts, just as before, are striking a responsive, and indeed, far more dangerous chord in the lower courts. Through a contorted application of the market participant doctrine, the Second Circuit here has created an exception to the Commerce Clause that permits localities to block the free flow of interstate commerce at will, simply by structuring their laws so that their protectionist goals are accomplished by indirect means. If this sort of evasion is countenanced, this Court's *Carbone* decision will become a dead letter.

The lower court's conclusion is plainly wrong. This Court has repeatedly rejected the argument that under the Commerce Clause a local government may do indirectly what it cannot do directly. Indeed, the point was reemphasized only a few weeks after *Carbone* was decided:

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. . . . *"The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its *practical operation* work discrimination against interstate commerce."

*West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2215-16 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (emphasis added)).

*West Lynn Creamery* also dramatically illustrates another dictate that the Second Circuit declined to follow. The court of appeals viewed its task as one of "decid[ing] whether each [of three] components of Babylon's waste system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause." (Pet. App. at 17a.) The Second Circuit then analyzed each component separately, finding that some constituted market participation and thus were not subject to the Commerce Clause, and that some constituted regulation but, viewed in isolation, did not discriminate against or burden interstate commerce. (*Id.*) But this Court explicitly rejected such a component-by-component approach in *West Lynn Creamery*, 114 S. Ct. at 2215, instead requiring that "the constitutionality of the program as a whole" be scrutinized.

The Third Circuit also demonstrated its unwillingness to accept the teachings of *Carbone* in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed sub nom. Tri-County Indus. v. County of Mercer*, 64 U.S.L.W. 3510 (U.S. Jan. 30, 1996) (No. 95-1127). As the petition for certiorari filed in that case explains in more detail, the Third Circuit's decision addressed two separate Commerce Clause challenges to municipal "flow control" plans. In evaluating the constitutionality of those schemes, the Third Circuit focused on "the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." *Id.* at 802. The court conceded: "we cannot cite any authority for th[is] sort of inquiry." *Id.* Despite this lack of support, however, it concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, then there is no Commerce Clause

violation. *Id.* *Carbone*, of course, never mentions "process"; instead it stresses that the focus must be on the "design and *effect*" of the challenged scheme. *Carbone*, 114 S. Ct. at 1683 (emphasis added).

It appears that some lower courts have basically concluded that local waste control is desirable from a policy standpoint, and are determined to uphold waste control schemes even if this requires a distortion of fundamental Commerce Clause jurisprudence. But in so doing, the courts are arrogating to themselves a role that is reserved to Congress. As Justice O'Connor pointed out in her concurring opinion in *Carbone*, "[i]t is within Congress' power to authorize local imposition of flow control." 114 S. Ct. at 1692. Until it does so, however, waste control schemes that direct waste to a local facility "cannot survive constitutional scrutiny." *Id.*

Since *Carbone* was decided, state and local government have made repeated efforts to persuade Congress to enact legislation authorizing local control of the flow of waste.[4] These efforts have been vigorously opposed by *amicus* NSWMA and numerous members of the solid waste industry, as well as other parties concerned about the proposed interference in the free market for waste services.[5] Thus far Congress has refused to enact any of

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[4] *See, e.g.*, S. 534, 104th Cong., 1st Sess. (1995); S. 465, 104th Cong., 1st Sess. (1995); H.R. 2323, 104th Cong., 1st Sess. (1995); H.R. 1180, 104th Cong., 1st Sess. (1995); H.R. 1288, 104th Cong., 1st Sess. (1995); H.R. 1085, 104th Cong., 1st Sess. (1995); S. 485, 104th Cong., 1st Sess. (1995); H.R. 24, 104th Cong., 1st Sess. (1995); S. 398, 104th Cong., 1st Sess. (1995); H.R. 342, 104th Cong., 1st Sess. (1995); H.R. 225, 104th Cong., 1st Sess. (1995); H.R. 2838, 104th Cong., 1st Sess. (1995); H.R. 4779, 103d Cong., 2d Sess. (1994).

[5] *See Flow Control Measures and Interstate Transportation of Solid Waste: Hearing Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce*, 104th Cong., 1st Sess. 29-36, 68-77, 131-33 (1995) (statements of H. Steven Walton, on behalf of the National Solid Wastes Management

the proposed bills, choosing instead to leave the constraints of the dormant Commerce Clause intact. In these circumstances, it is particularly important that the lower courts not be permitted to effectively nullify *Carbone* by upholding waste control schemes that Congress has repeatedly refused to authorize.[6]

The road map laid out by the decision below is certain to be followed by states and localities across the nation. The flow control ordinances that proliferated within the past decade were motivated by simple economic self-interest on the part of the local governments: having undertaken various forms of financial commitments to local waste facilities, local governments have a strong interest in insuring that all trash in the town goes to the local facilities. *See Carbone*, 114 S. Ct. at 1684

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Association; Richard F. Goodstein, Browning Ferris Industries; and Kay Martin, Ventura County, California); *Flow Control and Interstate Transportation of Solid Waste: Hearing Before the Subcomm. on Superfund, Waste Control and Risk Assessment, Senate Comm. on Public Works*, 104th Cong., 1st Sess. 35-39, 43-45 (1995) (statements of Jonathan H. Adler, Cooperative Enterprise Institute and Anthony F. Ciofalo, Chairman, National Solid Wastes Management Association).

[6] There is nothing new about state and local efforts to persuade Congress to overturn decisions of this Court striking down local restrictions on the free flow of waste. Indeed, seventeen years after this Court's decision in *City of Philadelphia*, state and local governments are still attempting to persuade Congress to authorize local restrictions on the *import* of out-of-state waste. *See, e.g.*, S. 373, 104th Cong., 1st Sess. (1995); H.R. 1180, 104th Cong., 1st Sess. (1995); S. 589, 104th Cong., 1st Sess. (1995); H.R. 1288, 104th Cong., 1st Sess. (1995); S. 465, 104th Cong., 1st Sess. (1995); H.R. 227, 104th Cong., 1st Sess. (1995); H.R. 1249, 104th Cong., 1st Sess. (1995); S. 534, 104th Cong., 1st Sess. (1995); H.R. 2323, 104th Cong., 1st Sess. (1995); H.R. 4779, 103d Cong., 2d Sess. (1994); S. 2126, 103d Cong., 1st Sess. (1994); H.R. 963, 102d Cong., 1st Sess. (1993); H.R. 3952, 102d Cong., 1st Sess. (1991). Here too, Congress has thus far refused to authorize such actions on the part of state or local governments.

("flow control ordinance is a financing measure").[7] Compliance with *Carbone* means that those local facilities will now have to compete for trash with out-of-town and out-of-state facilities. And to do so, the local facilities may be forced to lower their prices—which may well require the town to make good on the financial guarantees to the facility. Doing this "through general taxes or municipal bonds," as this Court suggested in *Carbone*, *id.*, is likely to be politically unpopular. Thus there are strong economic and political incentives for local governments to seize upon any opening created by the courts of appeals to perpetuate their flow control regimes in another form. This practical consequence underlines the importance of prompt consideration of this issue by this Court.

## II. REVIEW BY THIS COURT IS NEEDED TO CLARIFY THE LIMITS OF THE "MARKET PARTICIPANT" DOCTRINE

The Second Circuit upheld the flow control scheme at issue by reliance on the so-called "market participant" doctrine. In so doing, it has stretched that doctrine far beyond any plausible limits, creating an exemption that threatens to swallow the rule prohibiting discrimination against interstate commerce.

This Court itself has recognized that the "precise contours of the market-participant doctrine"—which have been addressed by this Court in only five cases—"have yet to be established." *South Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984). And a number of federal courts of appeals have expressed their uncertainty as to the application of that doctrine to a variety of fac-

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[7] *See also* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action (Background Document)*, at 3.B-2 (Sept. 1988); Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 Fordham Urb. L.J. 361 (Winter, 1995); Kelly Outten, Note, *Waste to Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373, 392 (1985).

tual circumstances. *See, e.g., GSW, Inc. v. Long County,* 999 F.2d 1508, 1511 (11th Cir. 1993) ("market participant doctrine . . . is a relatively new and difficult area of the Supreme Court's jurisprudence"); *Big Country Foods, Inc. v. Board of Educ.,* 952 F.2d 1173, 1178 (9th Cir. 1992) ("line between state market paritcipation and state regulation is a fuzzy one that has perplexed courts and commentators alike"); *Swin Resource Sys., Inc. v. Lycoming County,* 883 F.2d 245, 249 (3d Cir. 1989) ("[a]pplication of the distinction between 'market participant' and 'market regulator' has . . . occasioned considerable dispute"), *cert. denied,* 493 U.S. 1077 (1990). Given the nationwide importance of solid waste flow control, and the pivotal importance of the market participant doctrine in the Second Circuit's analysis, this Court should grant certiorari in order to clarify the relationship of that doctrine to general Commerce Clause jurisprudence.

The basic thrust of the market participant doctrine seems straightforward: it permits a locality to discriminate, under certain circumstances, in favor of its own residents when it purchases goods,[8] sells goods[9] or hires workers.[10] The rationale is that when the government participates in the marketplace like any private business, it has the prerogative to choose with whom it will deal, just as a private business can do.

The Second Circuit, however, has improperly expanded the "market participant" doctrine to condone a town doing what no private company could do—compel potential customers to use its services. Babylon does not just impose conditions on the collection and disposal of waste

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[8] *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976); *Wyoming v. Oklahoma,* 502 U.S. 437 (1992).

[9] *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980).

[10] *White v. Massachusetts Council of Constr. Employers,* 460 U.S. 204 (1983).

generated by the town itself—*i.e.*, by the City Hall, the town jail and other town buildings. Rather, through the use of its regulatory powers, Babylon has effectively compelled commercial businesses in the town to utilize the local disposal facility. This makes Babylon a "market regulator," not a "market participant."

Indeed, rather than a "market participant," Babylon is more properly characterized as a market monopolist. Unlike the other "market participant" cases cited above, Babylon has not entered into a commercial transaction in the marketplace alongside private businesses. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (declining to apply "market participant" exception since California's Lands Commission had "a complete monopoly over the sites" being leased; only "state's participation in the marketplace *as a competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985). Far from subjecting itself to the same restrictions imposed on private businesses in the marketplace—the prime justification for relieving a town of Commerce Clause restraints when it acts as a market participant [11]—Babylon here has used its regulatory power to create for itself a monopoly in the market it has chosen to enter. The fact that Babylon's monop-

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[11] *Reeves*, 447 U.S. at 439. For example, a private "market participant" cannot violate the antitrust laws. This Court has justified the Commerce Clause immunity of the "market participant" exception by noting that the antitrust laws apply to states acting as "market participants." *South-Central Timber Dev.*, 467 U.S. at 98-99 (1984) (plurality opinion). *See generally* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 629 (1993) (recommends that courts look to the antitrust laws to ensure that states do not abuse their powers in the guise of "market participants"). Indeed, the court below implicitly recognized the potential antitrust implications of its decision, since it remanded this case to the district court "for further proceedngs" with respect to a possible "claim under the Sherman Act" and other issues. (Pet. App. at 46c.)

oly power was authorized by the state [12] simply confirms the fundamental point—Babylon is acting in its governmental capacity as a market regulator, not as a market participant. This action alone should negate any claim of market participant status.

This case provides a perfect opportunity for this Court to delineate the contours of the "market participant" doctrine. Left on their own, lower courts are abusing that doctrine and, in so doing, are encouraging states and localities to make counterfeit claims of being "market participants" so that they can discriminate against interstate commerce. This Court must step in to keep the "market participant" doctrine from swallowing the dormant Commerce Clause rule.

## CONCLUSION

For the foregoing reasons, the petitions for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

BRUCE J. PARKER *
NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
4301 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20008
(202) 364-3730

* Counsel of Record

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[12] (Pet. App. at 31a.)

(3)

Supreme Court, U.S.
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MAR 11 1996
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No. 95-1271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

*Petitioners,*

VS.

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTOF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

ANTHONY E. CORE
Counsel of Record
ANTHONY E. CORE, P.C.
114 Old Country Road
Suite 652
Mineola, New York 11501
(516) 877-0334

*Counsel for Respondent Babylon Source Separation Commercial, Inc.*

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No. 95-1271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

*Petitioners,*

VS.

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

This instant matter is the companion case to that pending in No. 95-1223, *A.A. & M. Carting Service, Inc. et al. v. Town of Babylon et al.*, (hereinafter *A.A. & M.*) presently pending before this Court, which was decided contemporaneously with

the similar *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3551 (U.S. Feb. 20, 1996). This Court is respectfully referred to the briefs in opposition to *A.A. & M.*, as the cases arise from the same issue of the implementation of a commercial garbage district by the Town of Babylon in 1994.

Petitioners herein raise the same basic argument for why this Court should review the lower court's decision as did the Petitioner in *SSC Corp.* Additionally, Petitioners ask this Court to find that the court below ignored this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), as well as recent decisions of the Third and Eleventh Circuits. The decision of the court below, when read in conjunction with its decision in *SSC Corp.*[1], clearly displays appropriate deference by the court below to this Court's prior Commerce Clause jurisprudence, and provides no fertile grounds for the granting of certiorari.

## WHY THE WRIT SHOULD BE DENIED

Contrary to Petitioners' contentions, the decision of the court below did not "ignore" the teachings of *Carbone*. Rather, the court below found that the Town of Babylon was simply utilizing traditional police powers, fully consistent with prior decisions of this Court.

Furthermore, the decision of the court below is not inconsistent with decisions of other Circuit courts. Rather, the facts before the court below were dramatically different from those addressed by courts in both the Third and Eleventh Circuits.

## CARBONE WAS FOLLOWED, NOT IGNORED, BY THE COURT BELOW

Petitioners argue that the court below "virtually ignored" this Court's decision in *Carbone*. In reality, no fewer than

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[1] *See SSC Corp*, affirming the unconstitutionality of the Flow Control ordinance while reversing, on an analysis similar to the instant matter, the contract for Town residential waste.

five times did the court below address and reject Petitioners' arguments that *Carbone's* principles should be shoe-horned into the readily distinguishable facts of this case. The court below initially rejected Petitioners' attempt to place Babylon's system squarely within the *Carbone* framework.

> Babylon's waste management plan, ... neither discriminates against, nor imposes any incidental burdens on, interstate commerce. In reaching that conclusion, we reject the plaintiff's contention that the *Carbone* decision fashioned from the 'dormant' Commerce Clause a new, and unprecedentedly sweeping, limitation on local government authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars.

*USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1276 (2d Cir. 1995).

When the court below later analyzed whether or not Babylon's plan discriminated against interstate commerce, it stated "Babylon's waste management plan thus differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this Court in *SSC Corp.*" *Id.* at 1283. The court below again discussed *Carbone* with respect to Petitioners' claim that Babylon forced the generators of waste to do business with the designated hauler. Petitioners argued that this "mirrors the situation in *Carbone*," but the court below dismissed the argument, stating "[w]e need not revisit our rejection of that argument." *Id.* at 1288.

In analyzing Babylon's ability to use economic incentives (a zero tipping fee), to benefit local businesses, the court below again stated that "[t]his is perfectly consistent with *Carbone*, as well." *Id.* at 1291. Lastly, and perhaps most significantly, the court below, in rejecting Petitioners' claim that Babylon's system had a discriminatory effect, or that it impermissibly burdened interstate commerce, stated that:

> To the contrary, we believe that the Town of Babylon has taken to heart the Supreme Court's admonition in *Carbone* that if 'special financing is necessary to ensure the long-term survival' of the incinerator, then 'the Town may subsidize the facility through general taxes or municipal bonds."

*Id.* at 1292.

Notwithstanding what Petitioners have asserted in the instant petition for a writ of certiorari, the court below did not disregard precedents of this Court. On the contrary, as demonstrated above, the court below fully analyzed the facts of the instant case, and found that the teachings of *Carbone* were followed by the Town of Babylon. Consequently, this Court need not review the decision of the court below.

## THE THIRD AND ELEVENTH CIRCUITS

Petitioners attempt to demonstrate inconsistencies with other Circuit courts to support their request for review. However, in citing to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994)[2], Petitioners ignore the express consideration, and rejection of the market participation analysis of District Court Judge Thompson in *Waste Recycling*, by the Second Circuit in its companion decision. *See SSC Corp.*, 66 F.3d at 513, 516. In fact, a careful reading of *Waste Recycling* reveals that the Second Circuit may have been overgenerous in its characterization of the facts therein as similar to *SSC Corp.* There is no clear indication in the decision that the city of Geneva was actually collecting waste directly or by contract.

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[2] Petitioners inexplicably cite this decision in their brief as *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 29 F.3d 641 (11th Cir. 1994), *affirming*, 814 F.Supp. 1566 (M.D. Ala. 1993). Actually, the written decision, and thus the language and logic cited in the brief, was that of the District Court and not the Court of Appeals.

Even less similar to *Waste Recycling* is the instant case, where the court below first made a threshold determination that the Town, as a market regulator, could form the District and therefore collect and dispose of the Town's own waste. Only then did the court below look at the specific components of the District, and correctly found that the Town was acting as a market participant with **its own** solid waste. *USA Recycling*, 66 F.3d at 1289. *Accord White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983) (Boston's *own* employees); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (South Dakota's **own** concrete); *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) (Maryland's **own** abandoned cars); *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) (county's **own** landfill).

Petitioners next seek to characterize the decision of the court below as inconsistent with the Third Circuit's decision in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995). Notwithstanding the readily apparent factual distinctions, Petitioners argue that the Third Circuit's rejection of the public utility model argument is somehow applicable herein. The District at bar is not, and has never been claimed to be a utility, it is **actual** responsibility, and liability[3], by the Town, for the collection and disposal of the Town's commercial solid waste. The use of an agent, BSSCI, does not alter the scheme so as to place this case within the parameters of the New Jersey model.

Furthermore, the Third Circuit held in *Atlantic Coast* that New Jersey's comprehensive solid waste management scheme violated the Commerce Clause because the designation process employed by the State did not provide a "level playing field" to those both in-state and out of state. *Atlantic Coast*,

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[3] *See SSC Corp.*, 66 F.3d at 516, for an insightful discussion of the significance of CERCLA liability which attaches to the Town as a result of the formation of the District, and which is an additional compelling reason for upholding a municipality's formation of a District.

48 F.3d at 715. Petitioners' attempt to assert the argument that a level playing field did not exist with respect to Babylon's selection of BSSCI was rejected by the court below, when it stated that "[d]espite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce."[4] *USA Recycling*, 66 F.3d at 1290. The instant Petitioners did have the option, and, in fact, did participate in the bidding process, by attending pre-bid conferences and receiving a bid package, although Petitioners decided not to ultimately bid on the project.

This Court should not review Babylon's nondiscriminatory decision to select BSSCI for collection of waste within the District. No purpose would be served by this Court granting the instant writ of certiorari, as there is no split of Circuit authority as portrayed by Petitioners.

## MIS-CHARACTERIZATION OF THE PROCESSING ASPECT

Petitioners, in a desperate attempt to convince this Court to review the lower court decision, misstate both the level of solid waste to be collected by BSSCI that is "recyclable rich", and what will ultimately happen to this waste once collected by BSSCI. Other than a bald assertion, however, Petitioners offer no support for their statement that approximately 60% of the mixed commercial waste was separated for resale by U.S.A. Recycling.[5]

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[4] BSSCI was selected pursuant to a vigorous national bid, through a Request for Proposal process as prescribed in New York law. *See* General Municipal Law § 120-w (McKinney's 1986).

[5] In fact, the instant Petitioners have yet to find a consistent percentage to assert is "recyclable rich." At the District Court, Petitioners submitted affidavits which stated that they have been able to recycle upwards of 80% of the commercial solid waste at its facility. Now, however, that level is only at 60%.

Most significant about Petitioners assertion as to how much waste is "recyclable rich" is the erroneously conclusion drawn by Petitioners that this waste will simply be incinerated rather than processed. Pet. Brief at 7. As the record before the court below indicates, BSSCI fully intends to contract with a processing facility or facilities to separate any recyclable waste collected. It would be contrary to sound business and industry practice to simply bring the waste directly to a disposal site without first separating such waste.

## IRREPARABLE HARM

Petitioners urge review by this Court on the issue of whether irreparable harm should be found upon **any** claim of a constitutional deprivation. The fact that this issue was not dispositive to the case at bar should be sufficient to deny certiorari on this issue alone.

However, it is respectfully submitted that the lower courts, particularly the District Court judges who actually hear testimony, are deciding this issue in a relatively consistent manner, and the present state of the law should not be disturbed. In this instant case, then Chief Judge Platt, of the Eastern District of New York, after hearing counsel for both sides on multiple occasions, reasonably found that the case before him was solely about money, with no other grounds to support a finding of irreparable harm. The court below found that the record below supported the District Court's finding that "[Petitioners] alleged injuries would be entirely financial—and therefore remediable by an award of money damages." *USA Recycling*, 66 F.3d at 1295.

## CONCLUSION

By the foregoing, the writ of certiorari should be denied.

Respectfully submitted,

ANTHONY E. CORE
Counsel of Record
ANTHONY E. CORE, P.C.
*Attorneys for Respondent BSSCI*
114 Old Country Road
Mineola, New York 11501
(516) 877-0334

No. 95-1271

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IN THE

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OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

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*Respondents.*

**On Petition for a Writ of of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION

FRANK L. AMOROSO
*Counsel of Record*
NIXON, HARGRAVE, DEVANS & DOYLE LLP
990 Stewart Avenue
Garden City, New York 11530
(516) 832-7500
*Counsel for Respondents The Town of Babylon, The Town Board of the Town of Bablyon, Richard H. Schaffer, Supervisor, Francine V. Brown, Councilwoman, Patrick Haugen, Councilman, Robert Kaufold, Councilman, and Anthony Tafuri, Councilman*

*Of Counsel:*
STEPHEN L. BRASLOW
JAMES L. MANFRE
Town Attorneys
Town of Babylon
200 E. Sunrise Highway
Lindenhurst, New York 11757
(516) 957-3000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Where traditional municipal police power and statute authorize monopoly public service, does an exclusive garbage collection contract, competitively bid, violate the interstate commerce clause?

2. Whether the establishment of a commercial garbage district by a municipality discriminates against out-of-state interests where both the collection and disposal contractors are selected through open, public competitive bidding which involved aggressive solicitation of bidders nationally?

3. Whether a municipality which unilaterally provides collection and disposal of commercial municipal solid waste to everyone in its commercial garbage district is a market participant?

4. Whether the district court's finding that petitioners, if successful, could be compensated by monetary damages and therefore failed to establish irreparable harm, precludes injunctive relief?

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*- against -* *Petitioners,*

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*Respondents.*

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**On Petition for a Writ of of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF IN OPPOSITION

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### JURISDICTION

Petitioners' jurisdictional statement is complete and correct.

### STATEMENT OF THE CASE

Respondent incorporates by reference the Statement of Facts in the opinion below. *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995).

## REASONS FOR DENYING THE WRIT

Contrary to petitioners' exhortations, there is no divergence between this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) and the holding by the Second Circuit in the case at bar. For most of this century the paramount role of local government to control garbage collection and disposal has been recognized by this Court. The record here and the opinion of the Second Circuit in this case demonstrate clearly that the respondent Town of Babylon properly utilized traditional municipal police power to create a commercial garbage district in a manner consistent with the principles of this Court with respect to the dormant interstate Commerce Clause and the market participant doctrine.

### I. THERE IS NO NEED FOR THIS COURT TO RE-ADDRESS THE SCOPE OF MUNICIPAL POLICE POWER WITH RESPECT TO COMMERCIAL SOLID WASTE

Petitioners take the position that *Carbone* effectuated a sea change in the responsibility for municipal garbage collection and disposal. Petitioners would have this Court reverse the settled principle that garbage collection and disposal is a core function of local government in the United States. *See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905).[1] Petitioners misstate the

[1] In *California Reduction* and *Gardner*, this Court unequivocally authorized local governments to establish municipal collection and disposal systems to the exclusion of private interests. In *California Reduction*, this Court rejected a due process challenge to San Francisco's exclusive collection ordinance stating "it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." 199 U.S. at 319. In *Gardner*, this Court rejected a takings claim with respect to Detroit's exclusive collection and disposal ordinance.

law by suggesting that in *Carbone* this Court invalidated this venerable precedent *sub silentio* and articulated some new precept of interstate commerce jurisprudence.

Local and state governments throughout the country have relied on the clear articulation of authority contained in *California Reduction* and *Gardner* and have assumed primary responsibility for the collection and disposal of solid waste. Indeed, the holdings of these venerable cases have been codified in the Resource Conservation and Recovery Act ("RCRA"), in which Congress explicitly deferred the responsibility for waste management to state and local governments. *See* 42 U.S.C. § 6901 (a)(4) (1995) ("The collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies. . . .").

The approaches employed by municipalities in their efforts to manage effectively their waste vary tremendously, running the gamut from completely private,[2] to contractual licensing[3] or franchise arrangements,[4] to exclusively

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[2] One study estimated that seventy-one percent of the local governments in the United States rely on the private sector in one form or another for garbage collection. REASON FOUNDATION, PRIVATIZATION, 1993: 17th ANNUAL REPORT ON PRIVATIZATION 6, 17-18 (1993). For instance, the Government Accounting Office recently reported that in certain areas of Colorado and New Jersey, homeowners have no alternative but to contract with commercial collection firms because local municipalities do not provide or arrange for collection services. RESOURCES, COMMUNITY, AND ECONOMIC DEV. DIV., GOVERNMENT ACCOUNTING OFFICE, REPORT NO. GAO/RCED-95-3, SOLID WASTE: STATE AND FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 12 (1995).

[3] A recent survey found that thirty-six percent of cities and counties contract out to private entities for garbage collection. U.S. DEP'T OF HOUSING AND URBAN DEV., REDISCOVERING URBAN AMERICA 6-9 (Jack Sommer and Donald A. Hicks eds., 1993).

[4] For instance, California is a state that relies heavily on franchising solid waste collection services. The ability of local governments in California to grant franchises for solid waste collection

municipal collection and disposal. It is, however, the exclusive municipal collection and disposal systems which petitioners contend run afoul of *Carbone* and the dormant Commerce Clause. Petitioners' contentions are belied by applicable caselaw and the practical realities of government.

As the Court of Appeals for the Sixth Circuit noted, "[c]ourts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors." *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982). *See also, Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374-75 (9th Cir. 1984) (upholding an exclusive trash collection franchise), *cert. denied*, 472 U.S. 1028 (1985). In fact, legal authority for exclusive municipal collection of solid waste can be found in almost every state. *See, e.g.*, Alaska Stat. 29.35.050(3) (1995); *United States Disposal Sys., Inc. v. City of Northglenn*, 567 P.2d 365 (Colo. 1977); *Yohe v. City of Lower Burrell*, 208 A.2d 847 (Pa. 1965); *Cassidy v. City of Bowling Green*, 368 S.W.2d 318 (Ky. 1963); *City of Rochester v. Gutberlett*, 105 N.E. 548 (N.Y. 1914).

Indeed, in reports drafted after this Court's decision in *Carbone*, federal agencies have expressly concluded that government monopoly collection and disposal services remain viable. *See, e.g.*, RESOURCES, COMMUNITY,

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is derived from a state statute. *See* Cal. Pub. Res. Code 40059 (a)(2) (1986 & Supp. 1995) (authorizing local governments to provide waste collection services by means of, among other methods, "partially exclusive or wholly exclusive franchise"). Local governments have utilized this grant of discretion to mandate that solid waste be collected by franchised haulers. *See, e.g.*, Orange County Code 4-3-56 (mandating that solid waste in unincorporated areas of the county be collected by franchised haulers on an exclusive basis).

AND ECONOMIC DEV. DIV., GOVERNMENT ACCOUNTING OFFICE, REPORT NO. GAO/RCED-95-3, SOLID WASTE: STATE and FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 12 (1995) ("[C]ollection and disposal services may be owned and provided by the government. . . . For example, Los Angeles and New York City both own collection vehicles that dispose of residential waste at publicly owned and operated landfills."); OFFICE OF SOLID WASTE, ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS: FLOW CONTROLS AND MUNICIPAL SOLID WASTE III-81-82 (1995) ("Among the [waste management options] available to local governments are: providing waste collection services themselves and delivering the waste and discarded recyclables to selected facilities. . . .").

In a recent post-*Carbone* case, moreover, the Michigan Court of Appeals held that a municipality's exclusive contract for county-wide solid waste collection and the ordinances supporting the exclusive contract were constitutional. *Peninsula Sanitation, Inc. v. City of Manistique*, 526 N.W.2d 607 (Mich. App. 1994) (citing *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905)). The Court stated "the overwhelming weight of authority is that considerations of public health provide sufficient justification for the granting of an exclusive contract for the collection of solid waste." *Id.* at 610.

The decisions in the waste management arena, moreover, conform with decisions relating to state-granted monopolies in a variety of other contexts. At least five circuits and a number of district courts have upheld municipal mandates of the use of exclusive vendors.[5] For

[5] Petitioners contend that Babylon's decision to provide exclusive solid waste services is distinguishable from other services which a local government may permissibly provide on an exclusive basis. Petition at 19. For instance, petitioners concede that exclusive municipal street sweeping and street lighting is permissible, but only because the municipality provides such mandatory services

example, in *Transport Limousine of Long Island, Inc. v. Port Auth. of New York and New Jersey*, 571 F. Supp. 576 (E.D.N.Y. 1983), an exclusive airport livery service was upheld. Of particular interest, in *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985), the court upheld the city's right to eliminate competition and establish exclusive ambulance services within the city. Likewise, in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), the Ninth Circuit upheld a State Bar resolution requiring all attorneys to purchase malpractice insurance from the Bar. This measure was validated even though out-of-state insurance carriers were barred from competing within the Oregon market. The persistent theme in these cases is that where municipal police power is exercised in reasonable response to a traditionally local concern, the courts will not interfere.[6]

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solely to government entities. Petition at 19 n.12. Petitioners contention is, however, belied by the host of instances where local governments have been upheld in their efforts to mandate that private entities utilize exclusive municipal services despite the fact that a ready private market for those same services was in existence.

[6] *See generally, Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755 (9th Cir. 1986) (exclusive paramedic services); *Sand Crest Outpatient Serv., PA v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988) (exclusive emergency room services); *City Communications, Inc. v. City and County of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (cable franchise); *Hillman Flying Serv., Inc. v. City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987), *aff'd*, 846 F.2d 71 (4th Cir. 1988) (single aviation fuel vendor at airport); *Sea Air Shuttle Corp. v. Virgin Island Port Auth.*, 782 F. Supp. 1070 (D.V.I. 1991) (exclusive use for seaplane ramps); *Englert v. City of McKeesport*, 637 F. Supp. 930 (W.D. Pa. 1986) (single vendor for electrical inspection services); *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Auth.*, 715 F. Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989) (exclusive management contract for concert facility); *Coastal Neuro-Psychiatric Assoc., PA v. Onslow Memorial Hosp., Inc.*, 795 F.2d 340 (4th Cir. 1986) (exclusive contract with radiologist); *Allen Group, Inc. v. Aducci*, 123 A.D.2d 91, 510 N.Y.S.2d 747

In addition, New York State has explicitly authorized Babylon to manage, on a town-wide basis, all solid waste generated within the Town. Session Laws of 1985, Ch. 478 § 1. *See* Respondents' Appendix. Chapter 478 expressly declares that with respect to solid waste, it is *"the policy of the state of New York . . . to displace competition with regulation or monopoly public service." Id.* at § 2 (emphasis added). Clearly articulated state policies of this variety, which authorize the displacement of competition with monopoly public service, exempt states and their subdivisions from the strictures of the antitrust laws. *See Parker v. Brown*, 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978).

Petitioners, moreover, neglect to mention the fact that years ago the Town established a residential garbage district. Thus, for almost a decade, Babylon has utilized, on an exclusive basis, a company selected by competitive bidding to collect and dispose of residential garbage. Notwithstanding the exclusive residential collection district, petitioners urge that an exclusive commercial garbage district violates the dormant Commerce Clause. Carried to its logical extension, petitioners would have this Court rule that exclusive residential garbage collection and disposal violates the Commerce Clause.

It is indisputable that, pursuant to its police powers, a municipality may mandate the exclusive use of a municipally designated service provider. To rule that the Town lacks the authority to mandate exclusive service providers in an arena clearly within its broad police powers would run counter to a significant body of law and the practical realities of the way government works.

Petitioners would have this Court invalidate, in addition to Babylon's commercial garbage district, each of

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(App. Div. 3d Dep't 1987) ("sole source" contract for vehicle emission analyzers).

the referenced exclusive franchises, for whenever a government creates a monopoly, out-of-state entities "are deprived of access to local demand for their services." *Carbone*, 114 S. Ct. at 1683. In essence, petitioners contend that *Carbone* served to eliminate certain traditional state functions from the province of local government. This contention leads inexorably to the conclusion that, in addition to *California Reduction, Gardner*, and their progeny, the State action exemption also was overruled in *Carbone*.

It is inconceivable that this Court would have rendered such a revolutionary ruling by implication. *See Payne v. Tennessee*, 501 U.S. 808, 833-35 (1991) (Scalia, J., concurring) (discussing the "principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts"). Petitioners' portrayal of *Carbone* as fundamentally altering the manner in which local governments function simply is not plausible.

In the district court, co-plaintiffs A.A.&M.[7] conceded that the Town could effectuate its district with municipal employees and equipment. The petitioners at bar specifically refused to acknowledge the municipal police power to take direct responsibility for garbage collection. They reason that *Carbone* precludes municipalities from performing the role of local garbage collection and disposal. Petitioners' interpretation of *Carbone* is mistaken.

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[7] When Babylon established its commercial garbage district, two law suits were filed in federal district court more or less simultaneously. Although they were not formally consolidated, both cases, *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 12, 1996) and *A.A. & M. Carting Service, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3534 (U.S. Jan. 30, 1996) have proceeded in lockstep and were both the subject of the Second Circuit ruling which is the subject of these petitions for writs of *certiorari* brought by A.A. & M. Carting Service, Inc., et al. and USA Recycling, Inc., et al.

Notably, this Court denied *certiorari* in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996). This denial occurred after the petition at bar was filed and before Babylon's opposition was due. Suffice it to say that Babylon's commercial garbage district does not place an impermissible burden on interstate commerce because the taxpayers rather than the garbage haulers pay for collection and disposal directly in their tax bills [8] and because there was competitive bidding for collection and for disposal which were open to in-state and out-of-state entities on an equal basis.

Petitioners next claim that there is a split among the Circuits. Petitioners urge that *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996), decided by the Third Circuit, is inconsistent with the Second Circuit's opinion in the case at bar. Both Circuits have, however, assiduously adhered to the principles articulated in *Carbone*.

In *Harvey*, the Third Circuit analyzed whether the waste management systems at issue discriminated against interstate commerce by favoring in-state interests or disadvantaging out-of-state interests. In making this evaluation, the Third Circuit examined the process by which a single service provider was designated to ascertain whether or not out-of-staters in practice enjoyed equal access to the local market. 68 F.3d at 805-06, 808. The Third Circuit concluded that a municipality could choose a single provider, without violating the interstate Commerce Clause, "so long as the selection process was open and competitive and offered truly equal opportunities to

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[8] Babylon is not engaging in revenue generation at the expense of out-of-state competitors—it is utilizing its taxing authority to impose costs on its commercial and residential tax bases. As noted in *City of Philadelphia v. New Jersey*, a government "has every right to protect its residents' pocketbooks as well as their environment." 437 U.S. 617, 626 (1978).

in-state and out-of-state businesses." *Id.* at 798. Similarly, the Second Circuit in the case at bar upheld Babylon's selection process, noting that "[d]espite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce." 66 F.3d at 1290.

The Tenth Circuit has applied a similar analysis. *See Blue Circle Cement v. Board of County Commissioners*, 27 F.3d 1499, 1512 (10th Cir. 1994). The Third Circuit also applied this reasoning in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995) and held that New Jersey's designation process favored in-state facilities and therefore did not provide a "level playing field". *Id.* at 713.

Petitioners also maintain that the Second Circuit failed to consider *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, where the Eleventh Circuit let stand, without an opinion, an Alabama district court decision rejecting a mandatory flow control scheme. 29 F.3d 641 (11th Cir. 1994), *affirming*, 814 F. Supp. 1566 (M.D. Ala. 1993). As Babylon's waste management plan differs dramatically from the flow control ordinances challenged in *Waste Recycling*, petitioners' argument is flawed.

*Waste Recycling* involved the Southeast Alabama Solid Waste Authority, a public, non-profit corporation, organized by various municipalities to address their solid waste management needs. Three member cities signed "user contracts" with the Authority to utilize its solid waste services. Unlike Babylon's plan, these contracts required that each city adopt a "flow control" ordinance *mandating* that all solid waste collected within its boundaries by public or private collectors be delivered only to the Authority's facility. The user contracts also required that each city not authorize or approve any competing dis-

posal sites within its borders. The *Waste Recycling* plan, therefore, differs markedly from Babylon's provision of municipal waste management services.[9] Indeed, the approach in *Waste Recycling* is similar to the contractual approach this Court declined to review in *SSC Corp.* Consequently, *Waste Recycling* should provide no solace to petitioners here.

In sum, the Town of Babylon has followed the precepts set down by this Court in *Carbone.* Both the Second and Third Circuits have analyzed the varying fact-specific systems challenged and ruled in a fashion consistent with this Court's teaching in *Carbone* and this Court's interstate commerce jurisprudence.

## II. THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRIOR MARKET PARTICIPANT DECISIONS

Petitioners assert that the Second Circuit's decision is not supported by this Court's prior market participant decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); and *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).[10] In particular, petitioners assert that the Second Circuit ignored the regulatory aspect of Babylon's waste management system. Petition at 22.

Petitioners, however, completely misstate the Second Circuit's opinion. The Second Circuit expressly found

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[9] In addition, the court in *Waste Recycling* suggested that "*ad valorem* taxes, or utility bill assessments", measures which are similar to those adopted by Babylon, would be acceptable alternatives. 814 F. Supp. at 1581.

[10] In support of their market participation argument, petitioners mistakenly rely on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). However, this Court did not analyze the statute at issue there under the market participant doctrine.

that the market participant doctrine does not apply to the regulatory aspect of Babylon's waste management system, *i.e.*, "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection." 66 F.3d at 1282. Rather, on finding that the Town's creation of the commercial garbage district did not discriminate against interstate commerce, the Second Circuit applied the *Pike* balancing test and held that the Town's waste collection system did not impose incidental burdens on interstate commerce that were excessive in relation to the local benefits. *Id.* at 1286-88. Thus, petitioners' assertion that the Second Circuit wrongly applied the market participant doctrine to the "regulatory aspects of the Babylon scheme" is completely baseless.

Additionally, in a wane attempt to support their untenable position, petitioners seek to distinguish this case from the market participant decisions decided previously by this Court. Petition at 21-22. According to petitioners, the "critical distinction" is that unlike the prior cases, by creating the commercial garbage district the Town is forcing generators of solid waste to use the Town's services. *Id.* at 21. Once again, however, petitioners completely overlook the fact that the Second Circuit did not apply the market participant doctrine to the creation of the district here. In fact, the Second Circuit addressed this argument directly.

> No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a seller in the market. Although the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base.

66 F.3d at 1283.

To the extent that petitioners implore this Court to consider the "design and effect" of the Town's waste management system (Petition at 18), even if each component of the system is valid, petitioners position is not supported by this Court's prior market participant decisions. For example, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court rejected the "design and effect" approach by distinguishing and considering separately for purposes of applying the market participant doctrine, each activity in which the State was involved. It was only after finding that the State was not a participant in the timber processing market, but only the timber sales market, that this Court held that the State of Alaska could not impose restrictions on the processing market under the guise of the market participant doctrine. *Id.* at 99.

In the case at bar, the Second Circuit fully considered and correctly decided the issues in accordance with the limitations of the market participant doctrine established by this Court. Rather than look at the total effect of the Town's waste management system, as petitioners urge, the Second Circuit was careful to distinguish each component of the system, including the Town's decision to replace the private market for commercial garbage collection with a uniform municipal collection system, as required under *Wunnicke*. 66 F.3d at 1282.

Finally, notwithstanding petitioners' assertion that the scope of the market participant doctrine is in need of clarification, this Court has refused the opportunity to address the market participant doctrine on at least seven occasions, most recently in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (Feb. 20, 1996).[11] The Second Circuit's

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[11] See *also, Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 909-12 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991); *Swin Resources Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-51 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990); *Shell Oil Co. v.*

decision at bar is consistent with the market participant doctrine established by this Court and therefore, there is no reason for this Court to grant a writ of *certiorari*.

## III. NO FURTHER DIRECTION FROM THIS COURT IS NEEDED REGARDING DEPRIVATION OF A CONSTITUTIONAL RIGHT AND IRREPARABLE INJURY

The Second Circuit upheld the district court's explicit finding that petitioners have not demonstrated irreparable harm. The Second Circuit found that "[b]ecause the record supports the district court's determination that plaintiffs' alleged injuries would be entirely financial—and therefore remediable by an award of money damages —we cannot say that the district court clearly erred when it found that the plaintiffs had not demonstrated irreparable harm." 66 F.3d at 1295.

Petitioners ask this Court to establish a bright line as to whether the deprivation of a constitutional right constitutes irreparable harm for purposes of obtaining a preliminary injunction. Petition at 20-24. This Court, however, has already decided that deprivation of a constitutional right does not automatically constitute irreparable injury. In *Socialist Workers Party v. Attorney General of U.S.*, 419 U.S. 1314, 1318 (1974), this Court upheld the Second Circuit's denial of injunctive relief even though the applicants seeking to enjoin the FBI from attending a national convention of the youth organization of the Socialist Workers Party claimed that the FBI's activities would have a "chilling effect" on their First Amendment rights.

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*City of Santa Monica*, 830 F.2d 1052, 1056-58 (9th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Smith v. Georgia Dept. of Agriculture*, 630 F.2d 1081, 1083 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981).

Petitioners misstate the law by asserting that there is a conflict among the lower courts on this issue. Petition at 27-28. Petitioners, however, fail to consider that irreparable harm is a factual issue within the discretion of the trial court, and cannot be subject to the bright line test which they now seek. *See, e.g., Socialist Workers Party*, 419 U.S. at 1318 (Supreme Court noted with approval that the Court of Appeals had "analyzed the competing interests at some length"); *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) (assertion of First Amendment right does not automatically require finding of irreparable injury). The conclusion that an injury is irreparable involves considerations of preserving the status quo, whether an adequate remedy at law exists, public policies and interests, and the possibility of harm to other interested persons. *See Eli Lilly & Co. v. Premo Pharmaceuticals Laboratories, Inc.*, 630 F.2d 120, 136 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980).

Petitioners, however, avoid any discussion of the facts in this case and the cases on which they rely in order to create the illusion of a conflict among the lower courts. Petitioners' Appendix at 49a, 51a. However, as the Honorable Thomas C. Platt recognized in the district court, the facts of this case are clearly distinguishable from those where fundamental freedoms are at issue.[12] *Id.* at 49a.

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[12] In the case at bar the district court stated:

> In any event, I understand what the parties have expounded to me, namely, the plaintiffs say that they will suffer irreparable harm by virtue of the fact that 75 or 90 percent of lost profits on behalf of one or more of the plaintiffs, but there is a—there is no irreparable harm in the totally destructive sense, and it is a question of monetary damages.
>
> And while, in the case of First Amendment constitutional violations, there is very rarely a case that you could be made whole by monetary damages, in a case of this kind I think the likelihood of not being able to be compensated for monetary damages is probably pretty thin.

Petitioners' Appendix at 49a.

Petitioners' analysis is therefore faulty and they have failed to raise a valid issue worthy of this Court's review.

## CONCLUSION

This Court should deny a writ of *certiorari* on all issues raised in the Petition.

Respectfully submitted,

FRANK L. AMOROSO
*Counsel of Record*
NIXON, HARGRAVE, DEVANS
& DOYLE LLP
990 Stewart Avenue
Garden City, New York 11530
(516) 832-7500
*Counsel for Respondents The Town of Babylon, The Town Board of the Town of Bablyon, Richard H. Schaffer, Supervisor, Francine V. Brown, Councilwoman, Patrick Haugen, Councilman, Robert Kaufold, Councilman, and Anthony Tafuri, Councilman*

*Of Counsel:*
STEPHEN L. BRASLOW
JAMES L. MANFRE
Town Attorneys
Town of Babylon
200 E. Sunrise Highway
Lindenhurst, New York 11757
(516) 957-3000

# APPENDIX

## APPENDIX

## BABYLON, TOWN OF—MANAGEMENT OF SOLID WASTE

NEW YORK SESSION LAWS OF 1985

CHAPTER 478

Approved and effective July 19, 1985

Message of necessity, pursuant to Art. III, sec. 14, of Const.

AN ACT authorizing and empowering the town of Babylon to adopt a local law for the management of solid waste generated within such town

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Notwithstanding the provisions of any general, special or local law to the contrary, the town of Babylon is authorized to adopt and amend a local law to be known as the solid waste management law. Such law shall provide for the management on a town-wide basis of all solid waste generated within the town of Babylon. Such law shall also authorize the town, directly or by contract with a public or private corporation, authority or industrial development agency, through its commissioner of sanitation, or such other department head as may be designated by the town board, to supervise and regulate the transportation, disposition and collection of all or part of any solid waste within the town, pursuant to standards established in such local law. Such standards in the local law shall not be inconsistent with standards established pursuant to the environmental conservation law.

§ 2. It is hereby declared to be the policy of the state of New York with respect to the collection, trans-

portation, delivery, storage, processing and disposal of solid waste in the town of Babylon, in the county of Suffolk, to displace competition with regulation or monopoly public service. In furtherance of this policy, the town of Babylon is hereby authorized to adopt a local law (1) to exclusively control all solid waste and all energy and materials derived therefrom, including without limitation the collection, transportation and delivery of solid waste to a designated resource recovery facility or facilities within the town of Babylon for storage or processing or for any other disposition or handling; and (2) to provide for the establishment and collection from time to time of charges as compensation for the service of disposing or handling of such solid waste, all in order to assure a regular solid waste collection and disposal or handling service for the people of the town of Babylon. The town shall not prohibit municipalities located wholly or in part within the town from engaging in the collection or transportation of such solid waste to the designated resource recovery facility.

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Supreme Court, U.S.
FILED
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No. 95-1271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

*Petitioners,*

*-against-*

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONERS' REPLY BRIEF

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FREDERICK EISENBUD
Counsel of Record
RICHARD C. CAHN
EUGENE L. WISHOD
CAHN WISHOD & LAMB, LLP
534 Broadhollow Road
CS 9034
Melville, New York 11747
(516) 694-2300

*Counsel for Petitioners*

OFFICIAL OFFSET PRINTING CORP. • 860 NEW HORIZONS BLVD. • AMITYVILLE, NY 11701 • (516) 957-8500

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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No. 95-1271

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USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

*Petitioners,*

*-against-*

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONERS' REPLY BRIEF

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## ARGUMENT

### 1. Review Must be Granted to Clarify When Regulatory Action "Discriminates Against Interstate Commerce"

Respondents seek to persuade this Court that the petition should be denied because the question presented, if answered

in the affirmative, would effectively declare "the municipal police power to take direct responsibility for garbage collection" to be at an end. Town of Babylon Brief in Opposition at 8. Because this is not the case, it is important at the outset to clearly state what Petitioners do *not* argue, so that the central issue before the Court will be clear.

Petitioners do *not* challenge the police power of the Town to regulate garbage collection and disposal to protect the health, safety, and welfare of its citizens.[1] Petitioners do *not* challenge the right of the Town to collect and dispose of garbage generated by municipal employees as it sees fit, or to hire a private entity such as BSSCI to collect and dispose of the garbage generated by the Town's employees as the Town directs. Petitioners do *not* challenge the right of the Town to offer garbage collection and disposal services to anyone who wishes to use those services, or to hire a private entity such as BSSCI to provide those services on behalf of the Town. Petitioners do *not* dispute that the State of New York has authorized the Town, with regard to collection and disposal of garbage, "to displace competition with regulation or monopoly public service." 1985 Laws of N.Y. ch. 478. Petitioners do *not* dispute that the two turn-of-the century decisions of this Court in *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306 (1905) and *Gardner v. Michigan,* 199 U.S. 325 (1905) together hold that a municipality, pursuant to its police power, may provide exclusive garbage collection and disposal services.

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[1] We do not concede, however, that the Babylon scheme is anything other than a revenue raising measure. In the EPA's Report to Congress, "Flow Controls and Municipal Solid Waste," EPA 530-R-S95-008 (March 1995) at II-6, EPA found that: "Protection of human health and the environment is directly related to the implementation and enforcement of federal, State, and local environmental regulations. Regardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations that fully protect human health and the environment. Accordingly, *there are no empirical data showing that flow control provides more or less protection.*" (emphasis added).

Petitioners *do* disagree with the conclusion that the Town, consistent with the Commerce Clause and without Congressional authorization, may provide **exclusive** garbage services to businesses within the Town. Without Congressional authorization, the Town can offer garbage services; it may not force people to use them.[2]

The Second Circuit recognized that the Town achieved its monopoly within the District through the exercise of its regulatory powers, and so could not justify discrimination against interstate commerce by reliance upon the market participation doctrine. *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1282-83 (2d Cir.1995). Nevertheless, the lower court found that the exercise of monopoly control over a market that previously was open to competition did not discriminate against interstate commerce.

The reasoning of the Second Circuit -- that no one enjoys a monopoly position selling garbage collection services in the District because the Town eliminated the market entirely and is providing services as a local government, "not as a business selling to a captive consumer base" -- is absurd. *Id.* at 1283. According to the lower court, the Town is not selling anything, but is taxing people for services provided, and thus cannot be said to favor a single, local proprietor as in *Carbone.*

Based on this reasoning, had the Town of Clarkstown created a commercial garbage district, passed a regulatory scheme making the Town exclusively responsible for garbage collection, and then contracted with all the private carters who previously collected garbage in the Town to provide collection service on

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[2] Respondents deem it significant that this Court denied the petition filed in *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2nd Cir. 1995), *cert. denied,* 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996). The petitioner there, however, was the successful bidder for collection services in seven of the Town's ten residential districts, not a carter who was deprived of the right to collect, or a resident who was forced to use the Town's services. The issues raised by the instant petition would not have been resolved by a grant of *certiorari* in the *SSC Corp.* case.

behalf of the Town which would be billed to generators by the Town on a user fee basis, and allowed these carters to discharge garbage at the Town's transfer station for free (while making the carters responsible for disposal fees if they go elsewhere), this Court would have decided *Carbone* differently. There is not the slightest suggestion in the majority opinion that this would be the case, for the "design and effect" of such a scheme would still be to "hoard solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone*, 114 S.Ct. at 1683.

If a Circuit Court can conclude that a regulatory scheme that removes 96,000 tons per year of garbage from a once-open market for the benefit of the municipality that adopts that scheme does not discriminate against interstate commerce, then review by this Court to clarify the meaning of "discrimination" is badly needed.[3]

Discrimination must be determined based on the "practical design and effect" of the regulatory scheme on interstate commerce, *Carbone*, 114 S.Ct. at 1683, 1684. Respondents claim that, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court "rejected the 'design and effect' approach by distinguishing and considering separately for purposes of applying the market participant doctrine, each activity in which the State was involved." Town of Babylon Brief in Opposition at 13.

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[3] Respondent BSSCI suggests that the garbage will still be available to the market because "it intends to contract with a processing facility or facilities to separate any recyclable waste collected." BSSCI Brief in Opposition at 7. This is farcical. Under BSSCI's contract, it may bring 96,000 tons of waste per year to the incinerator for free, but must pay to bring it elsewhere. If BSSCI contracts with another facility to bring the solid waste to that facility so that recyclable material can be removed, that facility will have to pay to dispose of the residue, and obviously will charge BSSCI a fee for processing the waste, and disposal of the residue. As stated by the District Court, "the Service Agreement" 'gave BSSCI not only a powerful, but virtually an irresistable incentive to dispose of the waste at the town facility.'" *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1280 (2d Cir. 1995)

This argument demonstrates the need for review by this Court, not only of the meaning of "discrimination" and the scope of the market participation doctrine, but to reaffirm when market participation analysis is appropriate. In *South Central Timber*, the Court found that the market participant doctrine did not apply where the State required that timber taken from state lands be processed within the state prior to export. The doctrine was found not to apply because actions taken by the State as a market participant had down stream effects on the timber processing market, which the State was not a participant in. Because the Town of Babylon participates in both the garbage collection and garbage disposal markets, the Town claims that the separate analysis of each market by the Second Circuit was appropriate.

The fatal flaw in the Second Circuit's analysis is that it ignored the significance of the means by which the Town obtained control over the waste in the first instance. The State of Alaska already owned the timber, and did not have to exercise its police powers in order to obtain the right to sell timber. Nor did the State of Alaska seek to compel people within the State to purchase lumber from the State. The exercise by Babylon of its regulatory powers in the first instance to obtain control over the garbage within the district, and to force the generators of that waste to use the Town's services, which the Town claims it is offering as a market participant, is what distinguishes this case from *South Central Timber*, and all of the market participant cases decided by this Court.[4]

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[4] Respondent BSSCI also failed to make this distinction. BSSCI argues that, because the Second Circuit ruled that the Town could properly form the garbage district, the Town was collecting and disposing of its own waste, and thus was no different than the municipalities in the market participant cases decided by this Court. Respondent BSSCI's Brief in Opposition at 5. This argument begs the question which is before the Court: Could the Town, through regulatory enactments, properly hoard solid waste for itself that previously was available to the interstate market. Moreover, the Town did not seek to make the waste its "own;" if it had, it would have paid for collection and disposal out of general taxes. The services provided by the Town here are paid for by imposing user fees on the private businesses that must use the Town's services.

It is indisputable that the Town obtained control over the solid waste through exercise of its regulatory powers, and the "design and effect" of doing so was to hoard the waste for the benefit of the local facility. Because this constitutes discrimination against interstate commerce under *Carbone*, there was no reason for the Second Circuit to have reached the market participation doctrine issue. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (market participation exception would not apply because the state land commission had "a complete monopoly over the sites" being leased; only "state's participation in the marketplace as a *competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985).

**2. Review by this Court is Required to Affirm That the Mere Exercise of Police Power Alone Does Not Guarantee That An Action Will Not be Invalidated Under the Commerce Clause.**

The Second Circuit, by relying extensively on *California Reduction* and *Gardner*, clearly agrees with the argument of the Town that, "where municipal police power is exercised in reasonable response to a traditionally local concern, the courts will not interfere." Town of Babylon Brief in Opposition at 6. The lower court repeatedly emphasized that it was not for it to overturn ninety years of precedents, even though those precedents did not discuss the Commerce Clause. Thus the court said that it was deciding the case "against the backdrop of two venerable, and until now unchallenged, decisions of the Supreme Court [*California Reduction Co.* and *Gardner*]." 66 F.3d at 1292-93. Continuing, the Second Circuit stated that it "cannot brush aside two Supreme Court precedents that dealt with waste disposal systems so similar to the one before us today. If we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no longer undertake the traditional local governmental function of collecting town garbage." *Id.* at 1294. Thus the Second Circuit "refuse[d] to undercut the longstanding precedents

of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." *Id.*

Regardless how firmly entrenched a police power might seem to be, it is completely settled that it cannot be sustained if exercised in a way that discriminates against interstate commerce. A necessary predicate for Commerce Clause analysis is that the municipality act pursuant to its police powers -- without that finding, the Commerce Clause issue need not be reached. This Court has repeatedly made clear that a finding that a state or municipality has acted in accord with its police powers begins the Commerce Clause discussion, it does not end it. *See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon,* 114 S.Ct. 1345, 1354 (1994) ("if the State, under the guise of exerting its police powers, should [impose a burden]... applicable solely to articles [of commerce] ... produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States," *quoting, Guy v. Baltimore,* 100 U.S. 434, 443); *West Lynn Creamery, Inc. v. Healy,* 114 S.Ct. 2205, 2211-12 (1994) ("'Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents....").

### 3. Review By This Court is Required to Affirm That Congress, and Not The Courts, Must Determine When Discrimination Against Interstate Commerce Will Be Allowed.

The Town describes a parade of horribles that will arise if the Second Circuit's decision is not sustained. The concerns raised by respondents are not appropriate for the courts, however, for Congress has plenary power over the determination whether to permit a state or municipality to discriminate

against interstate commerce. Of the many cases cited by the Town that have upheld monopoly public service (Town of Babylon Brief in Opposition at 6 and n.6), all but two involved only antitrust claims, and the two that did discuss the Commerce Clause were decided before this Court's decision in *Carbone*.[5]

As discussed in detail by the New York State Conference of Mayors and Municipal Officials as *Amicus Curiae* in support of the petition filed in the companion case hereto, *A.A. & M. Carting Service, Inc. v. The Town of Babylon* (No. 95-1223), Congress thus far has refused to authorize flow control laws or their equivalent, even for facilities in operation before *Carbone* was decided, despite incessant lobbying by Towns such as Babylon in favor of such legislation. The Second Circuit's decision arose from a consideration of policy matters which should have been irrelevant to its determination. Review by this Court is required to clarify the proper role of the courts in matters relating to the Commerce Clause.

**4. Review By This Court Is Required Because Petitioners are Disenfranchised Within the Town, and Their Only Remedy for Protection of Their Constitutional Rights Lies Within the Courts.**

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[5] *Hass v. Oregon State Bar*, 883 F.2d 1453, 1462 (9th Cir. 1989); *Transport Limo. v. Port Auth. of New York*, 571 F.Supp. 576 (E.D. N.Y. 1983). In *Hass*, the court upheld against a Commerce Clause challenge a state-authorized requirement of the bar association that all members of the bar purchase malpractice insurance from the bar. The Court there made the same error in analysis that the Second Circuit did here -- it concluded that the statute did not discriminate against interstate commerce because it discriminates equally against in-state and out-of-state insurance companies because all are "effectively prevented from competing with the Bar to provide primary malpractice coverage." *Id.* The court did not have the benefit of this Court's decision in *Carbone*, where the Town's transfer station was the sole beneficiary of the regulatory scheme, yet discrimination against interestate commerce was found. In *Transport Limo.*, contrary to the Town's implied suggestion, the court did not uphold "an exclusive airport livery service" against a Commerce Clause claim. Town of Babylon's Brief in Opposition at 6. The issue under the Commerce Clause was not the validity of the exclusive bus service granted to Long Island Limousine, but whether an 8% tax on gross proceeds charged to every provider of limousine service using a desk and telephone at the airports provided

Because the Second Circuit has decided this case in a manner inconsistent with this Court's decision in *Carbone*, as well as decisions by the Third and Eleventh Circuit Courts of Appeal,[6] Petitioners' only remedy for relief is review by this Court.

The Town has an overwhelming financial interest in the garbage district which has nothing to do with its obligation to pay off bonds that were issued to finance the construction of the solid waste resource recovery facility. Simply put, garbage districts are "cash cows" that allow a municipality to raise revenue from the business community for general expenses with impunity. In Babylon, the actual cost to the Town for the right to dispose of solid waste at the incinerator is $78.00 per ton. The fees charged the businesses within the District are far in excess of what the Town needs, and are designed to raise money for other projects so that Town taxes on residents will not have to be raised. After the cost of collection by BSSCI is taken out, the $1,500.00 basic service fee calculates out to a disposal charge of approximately $272.00 per ton, and the $9.75 per cubic yard fee for each cubic yard above basic service calculates out to approximately $114.00 per ton for disposal.[7]

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by the Port Authority discriminated against interstate commerce. Because the tax was imposed on everyone equally, no discrimination was found. This decision is thus irrelevant to the instant case.

[6] *Atlantic Coast Demotion & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3rd 701 [3rd Cir. 1995], and *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Fupp. 1566 [M.D. Ala. 1993], *aff'd* 29 F.3rd 641 [11th Cir. 1994], decisions which the Second Circuit neither acknowledged nor discussed. In *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996), however, the same panel acknowledged the conflict with the *Waste Recycling, Inc.* decision, but refused to adopt the reasoning of the Eleventh Circuit. *Id.* at 515-16. Remarkably, the Town of Babylon chose to ignore Petitioners' discussion of the *Atlantic Coast* case, and instead treated another Third Circuit case [Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996)], helpful to the Town's position, as the case Petitioners asserted was inconsistent with the Second Circuit's decision! Town of Babylon Brief in Opposition at 9.

[7] This is hardly atypical. In the *Carbone* case, for example, the Town entered into a contract whereby a private party would construct a $1.4 million transfer sta-

The business owner petitioners have no protection against these outrageous charges other than to petition the courts for relief, for they are effectively disenfranchised within the Town. There are approximately 63,000 residential voters within the Town of Babylon, and only approximately 4,000 business owners and operators, most of whom live outside the Town, and cannot vote. Spreading solid waste costs out fairly within the Town would require the Town Board to raise residential property taxes, which it refuses, for political reasons, to do.[8]

The Second Circuit has usurped the power of Congress to determine when discrimination against interstate commerce will be allowed by refusing to apply controlling precedents of this Court. No remedy lies within the Town for these Petitioners; only this Court can restore their constitutional rights.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

Frederick Eisenbud
*Counsel of Record*
Richard C. Cahn
Eugene L. Wishod
Cahn Wishod & Lamb, LLP
534 Broadhollow Road
CS 9034
Melville, New York 11747
(516) 694-2300
*Counsel for Petitioners*

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tion in exchange for a five year guarantee that 120,000 tons of garbage each year would be delivered to the operator, who would be permitted to charge $81.00 per ton as a tipping fee. Thus the operator was guaranteed $9.27 million each year for five years (for a total of $48.6 million), in exchange for financing a $1.4 million facility! The decision of this Court is silent as to whether any of the money went back to the Town.

[8] Petitioners U.S.A. Recycling and Friendly Carting, who are prevented from collecting and processing the solid waste as they were free to do before creation of the District, resides outside of the town, and thus also are disenfranchised.